SUPREME COURT, U. S.

No. 73-806

NOV

MICHAEL ROD

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL PETROLEUM REFINERS ASSOCIATION, ET AL.,
Petitioners,

v.

FEDERAL TRADE COMMISSION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners (two trade associations and thirty-four petroleum refining companies) pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this case on June 27, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 482 F.2d 672 and is reproduced in the Appendix herein at A-30-101. The opinion of the District Court for the District of Columbia is reported at 340 F.Supp. 1343 and is reproduced in the Appendix herein at A-16-29. The Octane Posting Trade Regulation Rule of the Federal Trade Commission

("FTC" or "Commission"), with the Statement of Basis and Purpose, is reported at 16 C.F.R. § 422.1 and is reproduced in pertinent part in the Appendix herein at A-14-15.

JURISDICTION

The judgment and opinion of the Court of Appeals (A-30-101) were entered on June 27, 1973, and its further order denying rehearing (A-104) was entered on August 6, 1973. The time for filing this petition for a writ of certiorari was extended to and including November 20, 1973, by order of Chief Justice Burger dated October 26, 1973. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Did Congress, when it enacted the Federal Trade Commission Act of 1914, grant the Federal Trade Commission the statutory power to enforce the general prohibition of that statute by making substantive trade regulation rules having the force and effect of law?

STATUTE INVOLVED

Because this case involves the statutory meaning of Sections 5 and 6 of the Federal Trade Commission Act of 1914, we have set forth in the Appendix herein (A-1-13) those two sections of the Act as they originally appeared when the statute was enacted in 1914, 38 Stat. 719-22, and as they now appear with amendments in 15 U.S.C. §§ 45-46.

STATEMENT OF THE CASE

This case presents for the first time the very important legal question of whether the Federal Trade Commission

is authorized by its enabling act of 1914 to promulgate trade regulation rules having the binding effect of law.

Octane Posting Rule. On July 30, 1969, the FTC announced a proposed Trade Regulation Rule requiring the posting of "research" octane ratings on gasoline pumps at service stations (34 Fed. Reg. 12449). Under the proposed Rule, the failure to make such postings would constitute an "unfair method of competition" and a "deceptive act or practice" in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45).

The Commission staff attorneys then conducted preliminary administrative proceedings in which they received statements from interested parties who were neither under oath nor subject to cross-examination (CA App. 82).[1] Based upon these statements as well as matters outside the public record, the Commission, on December 30, 1970, issued the Octane Posting Rule requiring compliance within six months (36 Fed. Reg. 354).

On March 29, 1971, petitioners filed this lawsuit challenging both the Commission's authority to issue the Rule and the procedures used in its adoption (CA App. 1-28). Two weeks later the Commission postponed the effective date of the Rule and reopened the proceeding on the ground that it had received information questioning the "reliability" of the method of rating octane it had selected (36 Fed. Reg. 7309).

Without holding any further hearings, the Commission, on December 16, 1971, issued a revised Octane Posting Rule (A-14) requiring the posting of the "minimum octane number," a figure obtained by averaging two separate methods of octane determination (36 Fed. Reg. 23871).[2] This revised Rule, with an effective date of

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[1] "CA App." refers to the printed Appendix in the Court of Appeals, a copy of which has been lodged with the Clerk.

[2] The octane rating relates solely to the anti-knock characteristic of gasoline and of itself provides no measure of the overall

March 15, 1972, would require gasoline refiners and others who sell gasoline to retailers to adopt procedures for determining "minimum octane numbers" for posting on gasoline dispensing pumps located throughout the country (A-14).

The District Court's Opinion. On cross-motions for summary judgment, the District Court (Robinson, J.) was asked to decide the question of whether the Commission, under its 1914 enabling statute, is empowered to promulgate substantive rules of law or, as it calls them, "trade regulation rules."[3] In its opinion, the District Court initially considered (A-18-21) the Commission's basic argument that it was explicitly granted substantive rulemaking power under Section 6(g) of the FTC Act, which empowered the Commission "[f]rom time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act" (A-6).

The Court pointed out, however, that "both the context of Section 6(g) and the legislative history accompanying it demonstrate that this particular authority was not, nor has it been, granted" (A-19). Based upon its detailed review of the legislative history, the Court concluded that Section 6(g) was "intended only as an authorization for internal rules of organization, practice, and procedure" (A-19).

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quality of gasoline; gasoline quality is measured under industry standards by at least a dozen variables (CA App. 48-49, 99-100, 124-27).

[3] In addition to challenging the authority of the Commission to issue the Octane Posting Rule, the complaint in this action charged that the procedures used by the Commission in promulgating the Rule violated the requirements of due process of law, that the claimed delegation of substantive rulemaking authority by the Commission was such as to constitute an unlawful delegation of legislative power by Congress, and that the official record compiled in this proceeding before the Commission did not support the Rule (CA App. 1-28). Since the District Court decided the case on the basis of the Commission's lack of authority, it did not reach the other three contentions raised by plaintiffs below (A-17).

The Court first observed that Section 6(g) "originated in Section [8] of the House Bill of 1914 that conferred only investigative powers on the Commission" and, accordingly, that this provision "could only have been intended as an adjunct to the Commission's investigative powers" (A-19). In the Senate version of the FTC Act, which conferred adjudicative powers on the Commission, Section 6(g) was not included and thus the bill that passed the Senate "made no provision whatever for the promulgation of rules and regulations in any context" (A-19).

Thus, when the legislation reached the Conference Committee, the House-passed bill, dealing with investigative powers, contained the provision equivalent to Section 6(g) and the Senate-passed bill contained no rulemaking provision at all (A-19-20). Since it is settled under the parliamentary procedures of both Houses of Congress that the Conference Committee is not permitted to add new provisions or powers to a statute, the District Court concluded that Section 6(g) of the FTC Act could not have been enlarged in conference to grant the Commission substantive rulemaking authority (A-20, n. 12). Moreover, as the Court noted, during the course of the 1914 legislative process, "Congress refused to amend its proposals on two separate occasions that would have granted the Commission the very rulemaking power it now seeks to exercise" (A-20).

The District Court also considered the various statutory grants by Congress of substantive rulemaking authority to federal administrative agencies and concluded that the FTC, unlike other agencies, was not endowed with affirmative regulatory duties or powers, but was established as a quasi-judicial agency (A-18, 26-27, n. 32). The Court further rejected the Commission's attempt to analogize the FTC's powers to those of other agencies, pointing out that the FTC's function is "materially distinct from other administrative bodies" (A-18).

Further, in reviewing the six discrete instances where Congress, subsequent to 1914, had specifically granted substantive rulemaking power to the Commission in separate statutes (A-22-24), the Court stated that "where Congress intended to grant sustantive rulemaking authority to the FTC, it has done so clearly and unequivocally" (A-22).

The District Court observed, too, that the power to issue substantive rules would entail the power to "prescribe substantive law in such a manner as to vitiate the substantial procedural safeguards specified in the Act itself" (A-22). Therefore, the Court said, if Congress in fact had given such power to the Commission, it had done so without any procedural safeguards or even any guidelines as to how it was to be exercised. Since the reference to rules and regulations in Section 6(g) stands alone without any other reference to "this extraordinary grant" of power, the Court reasoned that this fact "lends credence to the conclusion that the Commission has no substantive, legislative rulemaking authority" (A-22).

Finding the Commission's argument that Section 5 impliedly granted rulemaking authority "patently untenable," the District Court stated: "If the legislative history of the Act will not permit the issuance of Trade Regulation Rules under the only section explicitly granting the Commission rulemaking authority, such sweeping authority cannot be based upon an implied grant of power in some other section of the Act or in the Act as a whole" (A-26).

The District Court also took cognizance of other facts —that the Commission in its first half century of existence had "never asserted the authority it claims to have always possessed"; that in fact "the Commission itself has repeatedly admitted that it has no power to promulgate substantive rules of law"; and that "many of the legal commentators" have independently reached the same conclusion (A-22, 27-28).

Based on this opinion, the District Court granted summary judgment to the plaintiffs and adjudged the Octane Posting Rule "null and void" (CA App. 157) since the FTC Act of 1914 "does not confer upon the Federal Trade Commission the authority to promulgate Trade Regulation Rules that have the effect of substantive law" (A-29). On May 8, 1972, the Commission filed a notice of appeal.

Decision of the Court of Appeals. On review, the Court of Appeals (Bazelon, Chief Judge, Wright and Robinson, Circuit Judges), in a 74-page opinion written by Judge Wright, reversed the opinion of the District Court and held for the first time that the FTC Act of 1914 conferred substantive rulemaking power on the Commission (A-30-77).[4] As the basis for its decision, the Court of Appeals relied on the "clear" and "plain" language of Section 6(g) authorizing the Commission "to make rules and regulations for the purpose of carrying out the provisions of this Act" (A-38, 54, 55, 61, 65, 68, 77).

While invoking the plain meaning doctrine of statutory construction, the Court elsewhere in its opinion admitted that Section 6(g) was "arguably ambiguous" and indeed susceptible to the opposite construction (see A-54, 64-65, 75). Specifically, the Court acknowledged that the District Court's construction of Section 6(g) as authorizing the Commission only to issue rules of procedure and practice was not "implausible" (A-54; also A-36-40), but it rejected that construction as being "crabbed" and "inhospitable" (A-45, 72) in favor of a "liberal" and "expansive" construction of the words in Section 6(g) (A-40, 44, 55, 65).

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[4] The opinion includes a 25-page appendix reviewing the legislative history of the FTC Act of 1914, with particular reference to Section 6(g) of that Act (A-78-101).

Turning to the legislative history of the 1914 Act, the Court of Appeals admitted its relevance in interpreting Section 6(g) (A-55), but concluded on the basis of its own review that it was "ambiguous" and "indecisive" (A-54, 55, 68, 78) and, in any event, not sufficient to "compel the conclusion" that the Commission was not meant to have substantive rulemaking authority (A-54).

Similarly, the Court was "not disturbed by the fact that the agency itself did not assert the power to promulgate substantive rules until 1962 and indeed indicated intermittently before that time that it lacked such power" (A-68, notes omitted). While admitting that "the accustomed judicial practice is to give 'great weight' to an agency's construction of its own enabling legislation, particularly when such a construction stretches back, as here, to a time close to the agency's origin," the Court below found that such judicial deference was not required in this instance where "the question is simply one of statutory interpretation" of the Commission's enforcement authority (A-70, citations omitted).

The Court of Appeals, however, found as a "more troubling obstacle" to the Commission's position "the argument that Congress was made fully aware of the formerly restrictive view of the Commission's power and passed a series of laws granting limited substantive rulemaking authority to the Commission in discrete areas allegedly on the premise that the 1914 debate withheld such authority" (A-72). But the Court rejected the argument of *de facto* ratification through Congressional acquiescence in administrative construction as "unwise," since it believed that Congress might have enacted the legislation "out of caution and to eliminate the kind of disputes that invariably attend statutory ambiguity" (A-75). By way of conclusion, the Court of Appeals stated that it felt confident that if Congress believed that the Court's construction of the statute gave the Commission "too much power, it will repeal the grant" (A-75).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals below, in construing the FTC Act of 1914 as conferring authority on the Commission to enforce that statute by use of substantive rulemaking, warrants review by this Court for three reasons:

First, this case presents a very important issue of first impression with respect to the authority of the Commission to promulgate substantive rules of law. In construing the 1914 enabling act as granting legislative-type rulemaking authority to the FTC some 60 years after the creation of that agency, the Court below has authorized the use of a method of enforcement that will radically alter the procedures used by the Commission in administering the prohibitions of the FTC Act—prohibitions which are among the broadest delegations of power by Congress ever made to an administrative agency and which affect the entire American economy.

Second, the Court below exceeded its judicial function in construing the FTC Act as authorizing substantive rulemaking, since neither the wording of that statute nor its legislative history grants such extraordinary enforcement power to the Commission. Indeed, the structure and language of the pertinent sections of the 1914 Act as well as the specific legislative history demonstrate that Congress did not intend the Commission to enforce the statute by substantive rulemaking.

Third, this Court needs to settle, once and for all, the legal question of the Commission's authority to issue substantive rules of law and thereby put to rest the controversy and confusion, both in Congress and among the business community, that surrounds the exercise of this authority by the Commission. If this issue is not finally determined at this time, the uncertainty will continue and actions by Congress and the courts will be taken on the basis of doubts with respect to the Commission's authority.

I

THIS CASE PRESENTS A NEW AND MOST SIGNIFICANT QUESTION INVOLVING THE ADMINISTRATION OF THE FEDERAL TRADE COMMISSION ACT

When Congress created the Federal Trade Commission as a quasi-judicial agency in 1914, it did so because it was dissatisfied with the administration of the antitrust laws.[5] In the 1914 enabling statute, Congress directed the Commission to prevent "unfair methods of competition" in interstate and foreign commerce (A-1). This mandate is one of the broadest, if not the broadest, delegations of authority by Congress to a federal administrative agency.[6] As the Court below acknowledged, the Commission's "expansive" jurisdiction "cuts deeply into and, with limited exceptions, widely across virtually all of American business" (A-52, note omitted).

In the same 1914 statute, Congress carefully spelled out in great detail the method by which the statute was to be enforced by the Commission. In Section 5, it not only set forth the necessity of issuing a complaint, holding hearings, making findings of fact, and issuing a written report and a cease and desist order, but it also included detailed provisions for judicial review in the courts of appeals and the Supreme Court, the entry of final orders, and the penalties for violation as well as the method by which violations shall be established (A-1-4).

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[5] For the legislative background of the 1914 statute, *see generally* HENDERSON, THE FEDERAL TRADE COMMISSION: A STUDY OF ADMINISTRATIVE LAW AND PROCEDURE (1924); CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS ch. IV(B) (1941); and *Holloway* v. *Bristol-Myers Corp.*, 1973-2 Trade Cases ¶ 74,623, at 94,751-53 (D.C. Cir. 1973).

[6] In 1938, the Congress further broadened the Commission's mandate to prevent "unfair or deceptive acts or practices." 52 Stat. 111, 15 U.S.C. § 45; see *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 239-44 (1972).

From 1914 to 1962, the FTC faithfully enforced the statute in accordance with the specific procedures provided by Congress in the enabling act (A-54, 68, 71, n. 29).

Now, almost 60 years after the passage of the 1914 enabling act, the Court of Appeals below for the first time reads that statute as "implying" that the Commission has a new and alternative method of enforcement, namely, legislative-type, substantive rulemaking (A-76, n. 40). In doing so, the Court authorizes the Commission to issue broad trade regulation rules having the effect of law without any of the procedural protections specified in the statute. Thus, by this single act of statutory interpretation, the Court below has granted the Commission a new enforcement power that will drastically alter the administration of the FTC Act.[7]

Enforcement by trade regulation rulemaking represents a radical departure from administrative adjudication. Instead of proceeding against individual respondents for past business conduct, the Commission now claims the right to enforce the FTC Act by promulgating general rules proscribing future conduct applicable to entire industries on a nationwide basis. As the Commission admitted in its brief in the Court below:

> "Such trade regulation rulemaking is not adjudicative in character. It is not a proceeding to determine whether or not particular persons or companies have violated the laws administered by the Commission. It is prospective, not retrospective, in its appli-

[7] A misconception that pervades the opinion below is that rulemaking merely "implements" or "supplements" adjudication and, therefore, is somehow subsumed in the existing adjudicatory powers of the Commission (A-34, 36, 40, 63, 66). This is simply not the case. It is well recognized that administrative adjudication and rulemaking are separate and alternative modes of enforcement to give content to the general statutory prohibitions of an act. For a statement of the basic differences in these modes of administrative enforcement, see the excellent article by Professor Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

> cation. Its purpose is to determine for the future whether certain business practices, if followed by the members of an industry, would be unlawful" (FTC Br. 5).

Apart from its virtually unlimited scope and application, the FTC's trade regulation rule procedure contains none of the procedural safeguards of administrative adjudication. In an FTC rulemaking proceeding, the affected parties do not have the right to examine or cross-examine witnesses, to introduce evidence, or to receive the protections of any of the other attributes of due process. No attempt is made to adhere to the rules of evidence and no sworn testimony is received. Moreover, in promulgating a trade regulation rule, the Commission need not confine itself to the official record, but, as Section 1.12 of its Rules provides, the Commission may rely on "knowledge derived from studies, reports, investigations, hearings, and other proceedings" (16 C.F.R. § 1.12).

Moreover, a trade regulation rule need not be based upon findings of fact. The affected parties in consequence are never informed of the full range of considerations which may have influenced or determined the Commission's action in issuing a rule. And after the Commission promulgates a trade regulation rule, there is no effective judicial review of the merits of the rule, since the FTC Act only provides for judicial review of final orders to cease and desist (A-10-11).

No court has ever imputed such an extraordinary grant of enforcement power, without procedural safeguards, to an administrative agency. Significantly, Congress has granted legislative-type, substantive rulemaking power to other federal agencies, but in each such case it has used explicit language in the statute (1) authorizing the use of rulemaking power and (2) spelling out the precise legal effect of such rules in terms of statutory penalties. Further, Congress has confined the granting of substantive rulemaking power to agencies possessing per-

vasive regulatory authority over specific industries such as transportation (ICC), airlines (CAB), natural gas and electric power (FPC), communications (FCC), securities (SEC), and the like.

For example, Sections 154(i), 201(b), 303(f), 303(j), 303(r), and 317(e) of the Federal Communications Act (47 U.S.C. §§ 151 *et seq.*) specifically authorize substantive rulemaking, and Section 213(f) of the statute provides, "all rules and regulations made by the Commission for the purpose of administering this section shall have the full force and effect of law." Further, Section 312 (a)(4) provides: "The Commission may revoke any station license or construction permit . . . for willful or repeated failure to observe any . . . rule or regulation of the Commission authorized by this chapter . . ." (47 U.S.C. § 312(a)(4)).

Even in the case of the FTC, Congress on six separate occasions has seen fit to enact specific legislation granting the Commission specific legislative-type rulemaking authority in the regulation of specific products. In the Wool Products Labeling Act of 1939, the Fur Products Labeling Act of 1951, the Flammable Fabrics Act of 1953, amended in 1967, the Textile Fiber Products Identification Act of 1958, and the Fair Packaging and Labeling Act of 1966, all of which deal with product labeling and packaging, subjects clearly within the substantive reach of Section 5, Congress specified the particular subjects upon which the Commission was authorized to issue substantive rules and regulations. Further, Congress specified in each of these statutes that business conduct violative of the rules and regulations of the Commission shall constitute an "unfair method of competition" or a "deceptive act or practice" within the meaning of Section 5 of the FTC Act.[8]

[8] Wool Products Labeling Act, 15 U.S.C. § 68a; Fur Products Labeling Act, 15 U.S.C. §§ 69a(a), (b), (c); Flammable Fabrics Act, 15 U.S.C. § 1194(c); Textile Fiber Products Identification Act,

Thus, it is evident that where Congress has intended to grant substantive rulemaking power to a federal agency, it has done so in clear and unequivocal terms. In this case, the Court below, by inferring such an extraordinary grant of power, has authorized the Commission to enforce the statute with the broadest substantive mandate—affecting the entire economy of the nation—without any of the procedural protections ordinarily associated with the exercise of such power. Not only will this decision substantially change the administration of the FTC Act, but it will affect the rights and obligations of those affected by the statute. Accordingly, we submit that this Court should review the statutory construction of the Court below (which it recognized to be an "important" one, A-31) to determine whether it is in accord with the original intent of Congress when it enacted the FTC Act in 1914.

II

THE DECISION BELOW IS BASED ON A MISREADING OF THE FTC ACT AND ITS LEGISLATIVE HISTORY AS WELL AS AN APPROACH TO STATUTORY INTERPRETATION THAT EXCEEDS THE PROPER BOUNDS OF THE JUDICIAL FUNCTION

The entire reasoning process of Judge Wright's opinion below proceeds from a basic and false premise, namely, that the "plain language" of the FTC Act confers legislative-type, substantive rulemaking power on the Commis-

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15 U.S.C. §§ 70a(a), (b), (c); Fair Packaging and Labeling Act, 15 U.S.C. § 1456(b). The sixth statute involved the so-called "quantity limit" rule contained in Section 2(a) of the amended Clayton Act, 15 U.S.C. § 13(a).

In 1941, when Congress was considering the legislation that became the Administrative Procedure Act of 1946, the FTC stated that it neither had nor desired substantive rulemaking power. *Hearings on Administrative Procedure Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 1st Sess., at 283-311 (1941).

sion (see p. 7, *supra*). What Judge Wright makes reference to is the language of Section 6(g) of the FTC Act, which empowers the Commission "[f]rom time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act." To say that this statutory language on its face authorizes substantive rulemaking requires a quantum leap of analysis which cannot be performed even with the aid of the plain meaning doctrine of statutory interpretation. Indeed, if anything is "clear" or "plain" from the wording of Section 6(g), it is that the language on its face contains no specific reference to "substantive" rulemaking.

An examination of the language of Section 6(g) and its place in the overall structure of the statute dictates a conclusion just the opposite from that which Judge Wright urges. Section 6(g) is part of the section of the FTC Act which itemizes the various investigative and related "housekeeping" powers of the Commission, as distinguished from its enforcement powers, which are contained in the preceding Section 5. Thus, as the District Court rightly pointed out, "both the context of Section 6(g) and the legislative history accompanying it demonstrate that this particular authority [substantive rulemaking] was not, nor has it been, granted" (A-19).

The legislative history referred to by the District Court shows that both houses of Congress, in enacting the FTC Act in 1914, were not only fully aware of the distinction between administrative enforcement by adjudication on the one hand and by substantive rulemaking on the other, but that they specifically refused to grant substantive rulemaking authority to the FTC and created the Commission as a quasi-judicial agency empowered to enforce the statute only by way of administrative adjudication (see A-19-22).

In trying to explain away this legislative history, Judge Wright engages in a tortuous reasoning process that

defies comprehension. While characterizing the Congressional history as "ambiguous" (A-54, 55, 68, 78), Judge Wright admits, as he must, that the separate bills that emerged from the two houses of Congress did not authorize the Commission to make substantive rules of law (A-86-90). Thus, Judge Wright is reduced to making the argument that substantive rulemaking power was somehow added to the legislation by the Conference Committee (A-89-91). But this argument cannot withstand analysis. In the first place, the Conference Committee merely adopted the language which is now contained in Section 6(g) of the Act from a comparable provision of the House bill, which Judge Wright's opinion acknowledges conferred no substantive rulemaking power (A-79, 89-90). Secondly, the Conference Report, as Judge Wright also admits, says nothing about the addition of any substantive rulemaking power to the statute (A-90-91). Thirdly, even if the Conference Committee had wanted to add substantive rulemaking power to the compromise bill, it was not authorized to do so under the parliamentary rules of Congress which prohibit a conference committee from including new legislation which has not been passed by one of the two houses (A-20, n. 12). Judge Wright's opinion recognizes this point, but dismisses it with the mystifying statement that "while this general principle of germaneness as to the powers of a conference may bind Congress, it has never bound the courts . . . ," citing *Cf. St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 221-22 (1961) (A-90-91).

But that case holds just the contrary. In *St. Regis*, the Supreme Court ruled that in interpreting changes made by a conference committee, the courts must assume that the conference committee included the same or substantially similar provisions as contained in the bills which it undertook to reconcile; and if the conference committee goes outside the bills, it must report such a change back to the House and Senate. As this Court stated in *St. Regis*:

> "If the conference had intended to give the Commission a separate, new power which was not included in either the House or Senate bill, surely there would be some mention of it in the reports by the managers." 368 U.S. at 222.

In the case of the 1914 FTC legislation, the reports by the conference managers contained no reference to the addition of substantive rulemaking power to the FTC Act (CA App. 386-403); and indeed the managers explicitly negated any such intention by assuring Congress that the Conference Committee bill was "within the limits of conference" (50 CONG. REC. 14925; also 14769 and A-90).

Lastly, in the post-conference bill debates, the leaders of the legislation reiterated their prior views that the FTC's enforcement authority did not encompass legislative-type, substantive rulemaking proscribing future conduct, but was limited to adjudication requiring entry of orders after complaint, hearing and findings of fact (51 CONG. REC. 14768-70, 14928, 14938, 14934). To give but one example, Representative Covington, who was one of the conference managers, stated in the final debates in the House:

> "The Federal trade commission will have no power to prescribe the methods of competition to be used in [the] future. In issuing its orders it will not be exercising power of a legislative nature. The basis, therefore, upon which the validity of the 'narrow' court review provided by the [ICC's] Hepburn Act [of 1906] rests will be lacking.
>
> "The function of the Federal trade commission will be to determine whether an existing method of competition is unfair, and, if it finds it to be unfair, to order the discontinuance of its use. In doing this it will exercise power of a judicial nature. Under the Constitution power to act finally in a judicial capacity can be conferred only upon a court." 51 CONG. REC. 14932.

The events which have occurred since the enactment of the 1914 Act fully confirm that Congress did not grant substantive rulemaking power to the Commission. The Commission itself during the first 50 years of its administration of the Act never sought to exercise legislative-type rulemaking authority. Neither did Congress believe that the FTC possessed substantive rulemaking power, for (as noted earlier at 13, *supra*) when it decided to confer legislative-type rulemaking authority on the Commission in a series of new laws enacted from 1939 through 1967 dealing with product labeling and packaging, subjects peculiarly fit for rulemaking, it specifically provided in those acts that the Commission was authorized to issue substantive rules and regulations with respect to those products. Similarly, in the nearly 60 years since the passage of the FTC Act, Congress has also expressly endowed various other federal regulatory agencies with substantive rulemaking powers; and in each such case, Congress has limited that grant of rulemaking power to agencies regulating specific industries (see pp. 12-13, *supra*).

Any one of the above-described post-enactment events might not in and of itself be conclusive on the question of Congressional intent, but taken together they certainly provide compelling evidence, when viewed in light of the language of the Act and its legislative history, that Congress did not grant substantive rulemaking power to the Commission.[9]

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[9] The leading legal scholars who have examined the FTC Act of 1914 and its legislative history have concluded that Congress did not confer legislative-type substantive rulemaking on the FTC. *See* Burrus & Teter, *Antitrust: Rulemaking* v. *Adjudication in the FTC*, 54 GEO. L.J. 1106, 1125-27 (1966); Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 490 (1970); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 960 (1965); Weston, *Deceptive Advertising and the*

Perhaps the result reached by the three-judge panel below is understandable only in terms of the arguments of expediency that Judge Wright makes throughout the opinion. Thus, it is stated over and over again in the opinion that substantive rulemaking is desirable or needed by the Commission to discharge effectively and fairly its statutory mandate (A-46-55, 62-64, 68, 71, 76-77). Not only does the Court below stress the administrative advantages of "efficiency," "expedition" and "certainty," which it claims inhere in rulemaking, but it invokes "contemporary considerations of practicality and fairness" as well (*see, e.g.*, A-40, 49, 63-64, 66-68, 71).

Whatever the merits of such policy arguments, they should be addressed to Congress, not to the courts. *See, e.g., Hanover Bank* v. *Commissioner*, 369 U.S. 672, 687-88 (1962). For the courts to imply a major enforcement power such as substantive rulemaking based on legislative considerations is not only improper but unwise, because courts simply cannot fashion the necessary limitations and procedural protections. *See, e.g., Holloway* v. *Bristol-Myers Corp., supra*, 1973-2 Trade Cases at 94,751. This fact is highlighted in this case, where the rulemaking power implied by the Court below is unlimited in scope and contains no procedural safeguards or appeal procedures, since the statute is silent on these points. Recognizing the problem but having no answer, Judge Wright simply states at the conclusion of his opinion that should the unlimited rulemaking power which the Court found to be "implied" in the statute be "too broad or lack sufficient safeguards," then it is up to Congress "to make

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Federal Trade Commission: Decline of Caveat Emptor, 24 FED. B.J. 548, 570 (1964).

See also, HART, REPORT OF THE PRESIDENT'S COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 332 (1937) ("the Federal Trade Commission has no rulemaking power"); Massel, *The Regulatory Process*, 26 LAW & CONTEMP. PROB. 181, 189 (1961); Note, GEO. WASH. L. REV. 330 (1972).

the required changes" (A-76, n. 40). Nor is it consonant with the proper judicial function for a reviewing court to say (as was done below) that it may render its "independent judgment" on the meaning of a statute on the theory that if Congress believes the Commission "exercises too much power," then it "will repeal the grant" (A-75, note omitted).

Everything that Judge Wright says in praise of substantive rulemaking by administrative agencies may well be true, although there may be a tendency to exaggerate the benefits of rulemaking vis-a-vis adjudication. The critical point here, however, is that it is not the function of a reviewing court to decide what enforcement powers the FTC should have but only what enforcement powers have been given to it by the Congress. In short, what this case calls for is a judicial determination, not a legislative or ideological judgment.

III

THIS COURT NEEDS TO SETTLE THE CONTINUING CONTROVERSY AND CONFUSION ABOUT THE AUTHORITY OF THE COMMISSION TO ISSUE SUBSTANTIVE RULES HAVING THE EFFECT OF LAW

In May 1962, when the Commission first indicated that it was going to enforce the prohibitions of Section 5 by substantive rulemaking, it did so in a tentative fashion without clearly defining the effect of the rules (27 Fed. Reg. 4636, 4796). As the Court below pointed out, for some time after May 1962 "the actual effect of these rules and the Commission's view of whether they were merely to be viewed as interpretive or statutorily based and thus determinative of the questions to be litigated in § 5 proceedings remained unclear" (A-71, n. 29).

In addition, the Commission's first ventures into substantive rulemaking were marked by caution and reflected concern over its authority to proceed as well as sensitivity

to political considerations. Initially, the Commission promulgated trade regulation rules involving relatively minor business practices of small industries such as the size of sleeping bags (16 C.F.R. § 400, effective November 12, 1963), the leather content of waist belts (16 C.F.R. § 405, effective January 1, 1965), and the size of tablecloths (16 C.F.R. § 404, effective February 1, 1965). Later, the Commission promulgated rules applicable to more important business practices of large industries such as cigarette labeling (29 Fed. Reg. 530, 8324, 12626, 15570, 30 Fed. Reg. 9484; preempted by 15 U.S.C. § 1331, *et seq.*), games of chance in the food-retailing and gasoline industries (16 C.F.R. § 419), and the instant Octane Posting Rule. More recently, the Commission announced intentions to promulgate trade regulation rules regulating the multi-billion dollar franchise business (36 Fed. Reg. 21607, 22187) and abolishing the centuries-old "holder in due course" doctrine for negotiable instruments in consumer credit transactions (36 Fed. Reg. 1211).

As the Commission moved into more controversial areas, the dispute over its statutory authority to promulgate substantive rules intensified. On three occasions, Congress passed statutes superseding Commission trade regulation rules.[10] On two other occasions, lawsuits challenging the Commission's rulemaking authority were instituted but were later dismissed for lack of ripeness. *Bristol-Myers Co.* v. *FTC*, 284 F.Supp. 745 (D.D.C. 1968), *aff'd in pertinent part*, 424 F.2d 935 (D.C.

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[10] A trade regulation rule involving unsolicited mailing of credit cards (35 Fed. Reg. 4614, effective May 18, 1970) was superseded by express provisions of the Truth-In-Lending Act (15 U.S.C. §§ 1642, *et seq.*); a rule involving advertising and labeling of cigarettes (29 Fed. Reg. 530, 8324, 12626, 15570, 30 Fed. Reg. 9484) was preempted by the Federal Cigarette Labeling and Advertising Act (15 U.S.C. §§ 1331, *et seq.*); and a proposed rule relating to shipment of unordered merchandise (35 Fed. Reg. 10116, 14328) was superseded by express provisions of the Postal Reorganization Act (39 U.S.C. § 3009).

Cir.), *cert. denied*, 400 U.S. 824 (1970); *Lever Bros.* v. *FTC*, 325 F.Supp. 371 (D. Me. 1971).

Beginning almost as soon as the Commission announced its intention to promulgate binding rules, Congress has been concerned with the question of whether the Commission should have substantive rulemaking power. In 1966, Congress enacted the Fair Packaging and Labeling Act, conferring limited rulemaking powers on the Commission in reliance on explicit representations made by the Chairman of the FTC in hearings held in 1963 that the Commission lacked such enforcement power (A-71, note 29).[11] Later, in 1967, the Flammable Fabrics Act of 1953 was amended to confer specific substantive rulemaking authority on the Commission (81 Stat. 571). Then, in 1969, a bill was introduced in the Senate to confer express substantive rulemaking power to enforce the prohibitions of Section 5 (S. 3201, 91st Cong., 2d Sess.). Since that time, numerous other bills have been introduced in both the House and the Senate, all meeting with varying degrees of success (H.R. 4809, S. 986, 92d Cong., 1st Sess.; H.R. 20, H.R. 7917, S. 356, 93d Cong., 1st Sess.). Each of these bills has involved a more limited grant of substantive rulemaking power than that inferred by the Court of Appeals below. Moreover, each of these bills has contained to a greater or lesser degree procedural safeguards including cross-examination, sworn testimony, the substantial evidence rule and direct judicial review. One of these bills was withdrawn earlier this year pending the outcome of this litigation (see S. REP. No. 93-151, 93d Cong., 1st Sess. 32 (May 1973)). Another of these bills was recently reported out of the

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[11] *Hearings on S. 387 Before Subcomm. on Antitrust & Monopoly of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess., at 281-82 (1963). *See also* a later statement to the same effect by FTC Chairman Dixon, *Hearings on H.R. 15440 Before House Interstate & Foreign Commerce Comm.*, 89th Cong., 2d Sess., at 990 (1966).

House Commerce Subcommittee and is currently before the full Commerce Committee (H.R. 7917).

Congress' uncertainty and confusion in this area has been shared by those persons and companies affected by the FTC's outstanding trade regulation rules as well as its publicly announced proposed rules. In connection with a trade regulation rule involving door-to-door sales, the Commission announced in October 1972 that this litigation created such uncertainty that the effective date of the rule would be deferred indefinitely (37 Fed. Reg. 22961). Rules which had been proposed and finalized prior to the District Court's opinion in this case have all experienced some measure of deferral or suspension as a result of the litigation (see 4 TRADE REG. REP. ¶¶ 38,029-32 (1973)). Moreover, rules which had been finalized with existing effective dates have all been cast into a status of doubt by the opinion. There can be no question that if this Court fails to resolve this issue now, further challenges to the FTC's substantive rulemaking power will result; and uncertainty and confusion will continue, with the accompanying legal cloud hanging over any trade regulation rule which the Commission may issue or seek to enforce.

CONCLUSION

Since this case squarely presents the fundamental legal issue of whether Congress has granted the FTC substantive rulemaking authority, and since this issue needs to be resolved now, we submit that this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

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STATUTE INVOLVED

Sections 5 and 6 of the Federal Trade Commission Act, as originally enacted by Congress in 1914, 38 Stat. 719-22, provided as follows:

SEC. 5. That unfair methods of competition in commerce are hereby declared unlawful. — Unfair methods of competition unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce. — Prevention by Commission.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in — Service of charges. — Appearance of accused. — Other parties may intervene. — Preservation of testimony.

Issue of order to desist.

any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

Modification, etc.

Enforcement. Application to circuit court of appeals.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree

Jurisdiction, etc.

affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Findings conclusive of facts.

Additional evidence.

Modification, etc., by Commission.

Decree final. Review by Supreme Court. Vol. 36, p. 1157.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission

Applications to set aside orders.

Procedure, etc.

as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

Exclusive jurisdiction of circuit court of appeals.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

Procedure, etc.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the antitrust acts.

Antitrust liabilities not affected.

Service of process.

Complaints, orders, and other processes of the commission under this section may be served by anyone duly authorized by the commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person, partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

Personal delivery.

At place of business.

By registered mail.

Proof of return.

Statute Involved

SEC. 6. That the commission shall also have power— Additional powers.

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships. Investigating business operations, etc., of corporations.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission. Requiring detailed reports, etc., from corporations.

(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of Investigating compliance with antitrust decrees.

Transmittal of finding, etc.

the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

Investigations for President or Congress.

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

Recommend business adjustments to comply with law.

(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

To make public information obtained.

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

Report to Congress.

Publishing reports, etc.

Classifying corporations.

(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.

Investigating conditions abroad affecting foreign trade.

(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

Statute Involved

Sections 5 and 6 of the Federal Trade Commission Act, as amended since 1914, 43 Stat. 939, 52 Stat. 111, 62 Stat. 991, 63 Stat. 107, 64 Stat. 21, 66 Stat. 632, 72 Stat. 809, 72 Stat. 942, 72 Stat. 1750, 74 Stat. 200, 15 U.S.C. § 45, provide in pertinent part, as follows:

Sec. 5 (a) Declaration of unlawfulness; power to prohibit unfair practices.

(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity

at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, for using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

(b) Proceeding by Commission; modifying and setting aside orders.

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it

in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by

it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

(c) Review of order; rehearing.

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to

the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

(d) Jurisdiction of court.

Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

* * * *

Sec. 6. The Commission shall also have power—

(a) Investigation of corporations.

To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) Reports by corporations.

To require, by general or special orders, corporations engaged in commerce, excepting banks and common car-

riers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the Commission may prescribe, and shall be filed with the Commission within such reasonable period as the Commission may prescribe, unless additional time be granted in any case by the Commission.

(c) Investigation of compliance with antitrust decrees.

Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the Commission.

(d) Investigations of violations of antitrust statutes.

Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

(e) Readjustment of business of corporations violating antitrust statutes.

Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be

violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

(f) Publication of information; reports.

To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

(g) Classification of corporations; regulations.

From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of sections 41 to 46 and 47 to 58 of this title.

(h) Investigations of foreign trade conditions; reports.

To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

Commission Trade Regulation Rule

TRADE REGULATION RULE OF THE FEDERAL TRADE COMMISSION

The Octane Posting Rule Promulgated by the Federal Trade Commission on December 16, 1971 (36 Fed. Reg. 23871) provides as follows:

In connection with the sale or consignment of motor gasoline for general automotive use, in commerce as "commerce" is defined in the Federal Trade Commission Act, it constitutes an unfair method of competition and an unfair or deceptive act or practice for refiners or others who sell to retailers, when such refiners or other distributors own or lease the pumps through which motor gasoline is dispensed to the consuming public, to fail to disclose clearly and conspicuously in a permanent manner on the pumps the minimum octane number or numbers of the motor gasoline being dispensed. In the case of those refiners or other distributors who lease pumps, the disclosure required by this Rule should be made as soon as it is legally practical; for example, not later than the end of the current lease period. Nothing in this Rule should be construed as applying to gasoline sold for aviation purposes.

NOTE: For the purposes of this Rule, "octane number" shall mean the octane number derived from the sum of Research (R) and Motor (M) octane numbers divided by two; (R+M)/2. The research octane (R) and motor octane number (M) shall be as described in the American Society for Testing and Materials (ASTM) "Standard Specifications for Gasoline" D 439-70, and subsequent revisions, and ASTM Test Methods D 2699 and D 2700.

(38 Stat. 717, as amended, 15 U.S.C. 41-58)

Effective: March 15, 1972.

Promulgated: December 16, 1971.

By the Commission.

Charles A. Tobin,
Secretary

[SEAL]

Commission Trade Regulation Rule

The accompanying Statement of Basis and Purpose in Support of Rule (36 Fed. Reg. 23871, 23883) provides in pertinent part as follows:

* * * *

VIII. *The Commission's Rule Making Authority*

The argument was made during the course of this proceeding, as has been done in other Trade Regulation Rule proceedings, that the Commission has no authority to promulgate Trade Regulation Rules. (See Record pp. 307, 359, 361, 364, 434 & n. 1, 578, 626, 702, 1447, 1455, 1483, 1492, 1520 and 1524.)

In its Statement of Basis and Purpose accompanying the Cigarette Rule, the Commission elaborated at length on its trade regulation rulemaking authority and concluded that a Trade Regulation Rule is ". . . within the scope of the general grant of rulemaking authority in Section 6(g) [of the Federal Trade Commission Act], and authority to promulgate it is, in any event, implicit in Section 5(a)(6) [of the Act] and in the purpose and design of the Trade Commission Act as a whole." (See Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking and Accompanying Statement of Basis and Purpose of Rule, pp. 127-150 and 150.) The Commission continues to adhere to that view.

* * * *

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 1180-71.

NATIONAL PETROLEUM REFINERS ASSOCIATION ET AL.,
Plaintiffs,

v.

FEDERAL TRADE COMMISSION ET AL.,
Defendants.

April 4, 1972.

William Simon, J. Wallace Adair, Robert W. Steele, Roger C. Simmons, of Howrey, Simon, Baker & Murchison, Washington, D. C., for plaintiffs.

L. Patrick Gray, III, Asst. Atty. Gen., Harold H. Titus, Jr., U. S. Atty., Harland F. Leathers, and Stuart E. Schiffer, Attys., Dept. of Justice, Ronald M. Dietrich, Gen. Counsel, Harold D. Rhynedance, Jr., Asst. Gen. Counsel, Alvin L. Berman, James P. Timony, Nicholas S. Reynolds, Attys., F. T. C., Washington, D. C., for the Federal Trade Comm. and others.

OPINION

AUBREY E. ROBINSON, Jr., District Judge.

This suit questions the authority of the Federal Trade Commission (FTC) to promulgate Trade Regulation Rules pursuant to 15 U.S.C. § 41 *et seq.* (1971). It is a case of "first impression," no other courts having directly considered the issue.[1]

[1] In two cases, courts have refused to enjoin the Commission from holding hearings looking toward the promulgation of Trade Regulation Rules holding that the proper procedure was to attack

The FTC announced, on July 30, 1969, that it intended to issue a Trade Regulation Rule declaring that failure to post octane numbers on gasoline pumps at service stations would be an "unfair method of competition" and a "deceptive practice," constituting a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1971) (hereinafter FTCA).[2] On December 30, 1970, the Commission issued such a Rule;[3] extended the effective date of the Rule on April 13, 1971 for the purpose of considering a revision thereof; withdrew the effective date[4] and proposed an alternative Rule on August 19, 1971;[5] and on December 9, 1971 issued a revised Rule in this respect that was to be effective March 15, 1972[6] but for a stay entered by this Court.

This Rule, in simple fashion, makes the failure to post octane numbers an "unfair method of competition" and an unfair or "deceptive act" or practice without the necessity of further proof. Plaintiffs here contend that the Commission lacks statutory authority to promulgate this Rule.

The Court need not consider the several other contentions raised by the Plaintiffs, for the answer reached here pretermits all other issues. For the reasons set forth below, that to this Court are persuasive, it is held that

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the rule after it issued. Bristol-Myers Co. v. Federal Trade Commission, 1968 CCH Trade Cas. ¶ 72,496, pp. 85,677-78 (D.D.C. 1968), rev'd in part and aff'd in part, 138 U.S.App.D.C. 22, 424 F.2d 935 (1970); Lever Brothers v. Federal Trade Commission, 325 F.Supp. 371 (D.Me.1971).

[2] 34 F.R. 12449 (1969).

[3] 36 F.R. 354 (1971).

[4] 36 F.R. 7309 (1971).

[5] 36 F.R. 16120 (1971).

[6] 36 F.R. 23871 (1971).

the FTC lacks the requisite statutory authority to issue Trade Regulation Rules.

Initially, one considers that the FTC is materially distinct from other administrative bodies. The FTC was created with the express purpose that it be a purely investigative body. This factor distinguishes the FTC from other agencies that are regulatory in nature. Recognizing that the FTC might serve a more vital function, Congress appended to FTC's investigatory powers, quasi-judicial authority to file complaints, hold hearings, afford due process and determine, based upon a finding of fact, whether violations of the FTCA had or were occurring. The determination having been made that a violation existed, the FTC was granted cease and desist power to correct and prevent its continuance. Judicial review of cease and desist orders was specifically provided for to the Courts of Appeals. These quasi-judicial powers are laid out separately in Section 5 of the FTCA.[7] The investigative powers of the FTC are expressed in Section 6 of the FTCA[8].

There is only one reference in the FTCA that speaks to the issuance of rules and regulations. The FTC relies heavily upon its substance and it states:

> The commission shall also have power—
>
> . . . . . .
>
> (g) From time to time to classify corporations and to make *rules and regulations* for the purpose of carrying out the provisions of sections 41-46 and 47-58 of this title. (emphasis added)[9]

This clause is located in Section 6 of the FTCA where the investigative powers are conferred.

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[7] 15 U.S.C. § 45 (1971).

[8] 15 U.S.C. § 46 (1971).

[9] 15 U.S.C. § 46(g) (1971).

While the authority at issue may at first impression be thought to fall within this section, to issue rules and regulations concerning deceptive or unfair trade practices or competition, both the context of Section 6(g) and the legislative history accompanying it demonstrate that this particular authority was not, nor has it been, granted.

The history of this section is clear. Section 6(g) of this Act was intended only as an authorization for internal rules of organization, practice, and procedure. The section was to insure that the FTC had the power to require reports from all corporations.[10] Section 6(g) of the FTCA originated in Section 7 of the House Bill of 1914 that conferred only investigative powers on the Commission.[11] This House Bill did not contain provisions analogous to Section 5 of the Statute, as enacted, that conferred adjudicative authority upon the FTC. This is because the House Bill considered the FTC as an investigative body. Thus, the rulemaking grant in Section 6(g) could only have been intended as an adjunct to the Commission's investigative powers. Supportive of this analysis is the fact that the Senate version of this FTCA made no provision whatever for the promulgation of rules and regulations in any context. Therefore, the only provisions concerning rules and regulations that were considered by the Conference Committee and the Congress stem from the House Bill. The existence of Section 6(g) in this statute could only pertain to housekeeping or procedural matters, as under the House Bill, the Commission had no authority to prescribe unfair, deceptive,

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[10] Federal Trade Commission Bill, Comparative Print, S.Doc. No. 573, 63d Cong., 2d Sess., p. 14, 15 (1914); H.R.Rep. No. 533, 63d Cong., 2d Sess., p. 3 (1914); 51 Cong.Rec. 8845, 9047, 9048 (1914).

[11] H.R. 15613, 63d Cong., 2d Sess., Sec. 8 (1914).

or anti-competitive business practices.[12] The House Bill conferred only investigative powers.

Notably, when the Senate Bill's provision enabling the Commission to institute adjudicative proceedings to prevent unfair methods of competition was added, there was no indication that Section 6(g) rulemaking authority was intended to extend to this new area affixed by the Senate Bill in such a way as to circumvent the extensive due process procedures expressly provided for in Section 5 of the FTCA. Despite several amendments to the Act, no indication of such an intent has since been expressed.

Significantly, Congress refused to amend its proposals on two separate occasions that would have granted the Commission the very rulemaking power it now seeks to exercise.[13] In addition to the provisions of Section 6(g), the Amendment offered by Congressman Lafferty urged

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[12] Having admitted that both the drafters in the House and the Senate had no intention of granting the Commission any rulemaking power, the Commission took the position that rulemaking authority was somehow mysteriously incorporated into the Conference Committee Report that was ultimately passed. Reasoning from this unsupported position, the Commission claimed that the House and Senate debates prior to the Conference Report were of no relevance to whether Congress intended to grant substantive rulemaking powers to the Commission.

In making this argument, the Commission ignores the fact that the legislative authority of a Conference Committee is limited to resolving differences between the two Houses. Such a Conference Committee cannot authorize new legislation that has not been submitted by one of the two Houses. *See* Jefferson's Manual, Section 546, which has governed House procedures since 1837. In short, the Conference Committee could not have given the FTC a power that was not included in the bill as it passed one of the Houses. House Rule XXVII (3) (1971); Rules and Manual of the United States Senate, Section 343 (1965). *See also* comments of Judge Covington, a member of the Conference Committee, 51 Cong.Rec. 14932 (Sept. 14, 1914); and the remarks of Congressman Sherley, 51 Cong.Rec. 14938 (Sept. 10, 1914).

[13] 51 Cong.Rec. 9047, 9049-50, 9056-57 (1914).

that the Commission be given the power to "make, alter, or repeal regulations further defining more particularly unfair trade practices or unfair or oppressive competition." [14] Thus, when Sections 6(g) and 5 were first proposed, Congress felt that an explicit grant of legislative authority was necessary, other than 6(g), to grant substantive rulemaking powers to the FTC. This Congress consistently refused to permit.[15]

Section 6(g) has remained unchanged since 1914, and it is still located in Section 6 of the Act among the Commission's other investigative powers.[16] If Congress at any time had intended to confer upon the Commission

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[14] H.R.Rep. 533, 63d Cong., 2d Sess., Part 3, p. 21 (1914).

[15] The amendment proposed by Congressman Lafferty that would have given the Commission the power to make, alter, or repeal regulations further defining more particularly unfair trade practices or unfair or oppressive competition also included the text of Section 6(g) within it. Thus, even in Congressman Lafferty's own view, Section 6(g) did not in and of itself confer the legislative rulemaking powers that the Commission now asserts it confers upon it. *See also* 51 Cong.Rec. 14,932 (1914) where Judge Covington, a member of the Conference Committee, who was called the "author of the bill," specifically stated in this regard: "The Federal Trade Commission will have no power to prescribe the methods of competition to be used in the future. In issuing its orders it will not be exercising power of a judicial nature . . . ."; and 51 Cong.Rec. 14,928 (1914) where Congressman Sherley expressed the thought: "In other words, (the Trade Commission) exercises in no sense a legislative function such as is exercised by the Interstate Commerce Commission." Moreover, the evidence is overwhelming that Congress intended the Commission to act only upon Orders issued in specific proceedings after a complaint, hearings, and basis in fact established. 51 Cong.Rec. 14,928 (1914).

[16] 1951 Annual Report of the Federal Trade Commission, pp. 16-18 that states "the broad scope of the Commission's authority to investigate is indicated" by the powers conferred on the Commission in Section 6 of the Federal Trade Commission Act, specifically including the rulemaking power of Section 6(g). Other annual reports also refer to the Commission's rulemaking power in an investigative context. *See, e.g.*, 1954, p. 12; 1955, p. 9; 1956, p. 9; and 1957, p. 8; all Annual Reports of the Federal Trade Commission.

the authority to prescribe substantive law in such a manner as to vitiate the substantial procedural safeguards specified in the Act itself, there certainly would be some reference to this extraordinary grant of power in the Act or the legislative history. The fact that there is none lends credence to the conclusion that the Commission has no substantive, legislative rulemaking authority under the FTCA.

It is important, also, to consider the fact that the FTC, for approximately 50 years from the passage of the FTCA, never asserted the authority it claims to have always possessed. This indicia points to the fact that the FTC knew it was not originally granted this rulemaking authority.

Another critical analytical factor is that where Congress intended to grant substantive rulemaking authority to the FTC, it has done so clearly and unequivocally.[17] In each of those instances Congress felt the need to specifically authorize the Commission to issue substantive rules.[18] These examples of specific authorization would be "a meaningless and superfluous legislative gesture" if the Commission had had the authority it now claims was given it in 1914.[19] The fact that Congress particularized the grant of substantive rulemaking power in these narrowly circumscribed statutes and yet did not do so with respect to the Federal Trade Commission Act, that deals,

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[17] Wool Products Labeling Act, 15 U.S.C. §§ 68-68j (1971); Textile Fiber Products Identification Act, 15 U.S.C. §§ 70-70k (1971); Fur Products Labeling Act, 15 U.S.C. §§ 69-69j (1971); Flammable Fabrics Act, 15 U.S.C. §§ 1191-1200 (1971); and the Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451-61 (1971).

[18] This is consistent with the Congressional belief in 1914 that a separate provision from Section 6(g) was necessary to grant the FTC substantive rulemaking authority.

[19] R. Burris and H. Teter, Antitrust: Rulemaking v. Adjudication in the FTC, 54 Georgetown L.J. 1106, 1125 (1965).

not with consumer labeling, but with "competition" generally in all its many aspects, makes clear that Congress did not intend the Commission to have such powers under the latter statute.

This conclusion is further substantiated by the history of the Flammable Fabrics Act. Unlike the Wool, the Fur, and the Textile Fiber Acts, the general rulemaking power granted the Commission in the Flammable Fabrics Act did not specify the subjects upon which rules could be issued, nor did it contain an express provision that a violation of rules promulgated would constitute a violation of the FTCA.[20] It provided only that the Commission could make, "such rules and regulations as may be necessary and proper for purposes of administration and enforcement of (the Act)," [21] *i.e.*, in language similar to that of Section 6(g) of the FTCA. In 1967, however, Congress amended the Flammable Fabrics Act [22] to specifically provide that the Commission could issue rules requiring the "maintenance of records relating to fabrics, related materials, and products" and the following language was added by Congress to that provision:

> The violation of such rules and regulations shall be unlawful and shall be an unfair method of competition and an unfair and deceptive act or practice, in commerce, under the Federal Trade Commission Act.

The purpose of that amendment, according to the Report of the House Committee on Interstate and Foreign Commerce, was to "make the Flammable Fabrics Act more flexible by permitting flammability standards and other regulations to be issued under rulemaking procedures

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[20] *Compare* 15 U.S.C. § 1192 (1964) *with* 15 U.S.C. § 68a, 15 U.S.C. § 69a(a), (b), (c), and 15 U.S.C. § 70a(a), (b), (c) (1964).

[21] 15 U.S.C. § 1194(c) (1971).

[22] Id. at 5.

rather than having them fixed by law as is now the case." [23] The report explained further that, under the amended Flammable Fabrics Act, the Commission was authorized "to establish regulations for recordkeeping" and that "(v)iolations of any such regulation would be an unfair trade practice under the Federal Trade Commission Act." [24]

The original language of the Flammable Fabrics Act was *in pari materia* to Section 6(g) of the FTCA.[25] Nevertheless, Congress felt the need to amend the statutes to give the Commission the power to include "provisions for maintenance of records relating to fabrics, related materials, and products," and the further need to amend the statutes to provide that violations of such rules would constitute a violation of Section 5.[26] Logic compels a similar need to spell out substantive rulemaking authority in the case of Section 6(g) before such authority can be said to exist. Congress has not done so.[27] The Commission's claim of unlimited rulemaking power under the FTCA is, therefore, not only unsupported by anything in that Act itself, or its legislative history, but is also inconsistent with the history of other statutes entrusted to the Commission's administration by Congress.

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[23] H.R.Rep. No. 972, 90th Cong., 1st Sess., p. 1 (1967) U.S.Code Cong. & Admin. News, p. 2136.

[24] *Id.* at 5.

[25] 67 Stat. 112 (1953).

[26] 81 Stat. 570 (1967).

[27] *See* Textile and Apparel Group, American Importers Ass'n v. Federal Trade Commission, 133 U.S.App.D.C. 353, 410 F.2d 1052, cert. denied, National Knitted Outwear Ass'n v. Textile and Apparel Group, Am. Importers Ass'n, 396 U.S. 910, 90 S.Ct. 223, 24 L.Ed.2d 185 (1969); Federal Trade Commission v. B. F. Goodrich Co., 100 U.S.App.D.C. 58, 242 F.2d 31 (1957) which indicates that broad power to promulgate trade regulation rules does not exist beyond the narrower grants of rulemaking authority given by the Congress.

[1] The Federal Trade Commission further argues that the words "rules and regulations" in Section 6(g) are to be defined as they are in the Administrative Procedure Act (APA): "The whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." [28] The Federal Trade Commission Act was passed in 1914. The APA was passed in 1946. It is inconceivable to this Court that those words, when written and considered by Congress in 1914, can have the same exact meaning as those words carry today via the 1946 APA. There exists no cross reference or other legal relationship between these words in their respective statutes. The APA gave a specialized construction to these words. Congress recognized this special meaning by amending the National Labor Relations Act, also passed before the APA, to read, "to make . . . in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter." [29] Congress, however, did not make a similar amendment to the Federal Trade Commission Act. The inference, therefore, is that Congress did not expect the FTC to engage in substantive rulemaking in the manner prescribed by the APA. The rulemaking power in Section 6(g) of the FTCA remains unchanged by Congress to date, and conveys only the authority to make such rules and regulations in connection with its housekeeping chore and investigative responsibilities.

[2] The Commission further contends that Section 5(a)(6) of the Act, that authorizes it to "prevent" unfair methods of competition, constitutes implied rulemaking power. In making this argument, the Commis-

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[28] 5 U.S.C. § 551(4) (1971).

[29] 29 U.S.C. § 156 (1971).

sion ignores Section 5(b), the very next paragraph of the statute that requires the Commission to conduct adjudicative proceedings. General rules of statutory construction and the scheme of the FTCA itself demonstrate that the mandate of Section 5(a)(6) is to be carried out by means of adjudicative process specified in Section 5(b).[30] Moreover, the Supreme Court has expressly stated that the FTCA must "be read as an integrated whole."[31] Thus, the FTC's claim is patently untenable. If the legislative history of the Act will not permit the issuance of Trade Regulation Rules under the only section explicitly granting the Commission rulemaking authority, such sweeping authority cannot be based upon an implied grant of power in some other section of the Act or in the Act as a whole. In the face of an overwhelmingly contrary legislative history, there must be some basis for granting an agency unprecedented and farreaching rulemaking power other than the claim of the agency itself that such power is necessary or desirable for its more efficient operation. The only support, however, for the Commission's novel theory of statutory construction is its own words. While the courts may have sustained imprecise grants of rulemaking power in some instances, they have never done so in the face of an overwhelmingly contrary legislative history, such as that of the Federal Trade Commission Act.[32]

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[30] Section 5 remained a single unitary provision without separate, designated subsections throughout the House and Senate consideration of the measure. Today's lettering of Section 5 paragraphs resulted from the 1952 McGuire Act, a development 38 years after the original passage of the statute and completely unrelated to the question here under consideration.

[31] United States v. Morton Salt Co., 338 U.S. 632, 650, 70 S.Ct. 357, 368, 94 L.Ed. 401 (1950).

[32] This factor readily distinguishes cases such as National Broadcasting Co. v. United States, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943) where neither the statutory scheme nor the legislative history of that Act clearly negated an implied grant of legislative

The record amply reflects that the Commission itself has repeatedly admitted that it has no power to promulgate substantive rules of law [33] and Congress has implic-

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power to the Federal Communciations Commission and that statute was intended to authorize an agency to broadly regulate a specific, narrow segment of industry; United States v. Oregon, 366 U.S. 643, 648, 81 S.Ct. 1278, 6 L.Ed.2d 575 (1961); United States v. Public Utilities Comm. of Calif., 345 U.S. 295, 73 S.Ct. 706, 97 L.Ed. 1020 (1953); Schwegman Bros v. Calvert Distillers Corp., 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed.2d 1035 (1951); Pacific Coast European Conf. v. Federal Maritime Comm., 126 U.S.App.D.C. 230, 376 F.2d 785 (1967). *See also* Weston, Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor, 24 Fed.Bar.J. 548, 570-71 (1964) where it is stated:

> To support its theory (of implied power), the FTC cites Supreme Court decisions involving the S.E.C. under the Public Utility Holding Co. Act, and the F.C.C. and the F.P.C. as authority for the proposition that an administrative agency has the choice to use either adjudication or rulemaking procedure to make 'substantive' rules. These cases, however, involve agencies with not only express power to issue 'legislative' rules but also with far more pervasive regulatory jurisdiction over the specialized industries involved. It may be that some agencies vested with both adjudicatory and legislative rulemaking powers have a choice of which procedure to use. But it is not at all clear that an adjudicatory agency specifically denied 'legislative' rulemaking power can use legislative type hearings to make 'substantive' rules other than merely 'interpretative' rules that are open to full-scale judicial review.

Testimony by former Federal Trade Commission Chairman Paul Rand Dixon before a Senate Subcommittee, Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st Sess. 169-70 (Oct. 31, 1963).

[33] Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st Sess. 169-70 (Oct. 31, 1963); Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 88th Cong., 1st Sess. 281 (March 20, 1963); Hearings before the Senate Committee on Commerce, 91st Cong., 1st and 2d Sess., p. 9 (Dec. 17, 1969); Hearings before the House Subcommittee on Commerce and Finance of the Interstate and Foreign Commerce Committee, 91st Cong., 2d Sess., p. 54, 76-77 (Feb. 4, 1970). *See also* Title II of S. 986, 92d Cong., 2d Sess. § 206 (1972),

itly rejected the efficacy of Commission Trade Regulation Rules by legislatively superseding them.[34] Moreover, the Supreme Court has impliedly rejected the Commission's claim of rulemaking power, as have many of the legal commentators.[35]

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currently pending in Congress, where Section 206 of that Bill would amend Section 6(g) of the FTCA to authorize the Commission to define with specificity through legislative rules those acts or practices which are unfair or deceptive to consumers and in violation of Section 5(a) (1) of the FTCA. It is noteworthy, here, that almost sixty years after the passage of the original Act that the Commission claims implicitly granted it authority to promulgate rules to regulate all otherwise non-regulated industries, the Senate found the grant of such authority so far reaching and so inherently capable of abuse that it retained a sixty day veto over any use of that power in their proposed Bill. It is further significant that Congress has still not passed this legislation giving the Commission rulemaking authority. *See*, Cong.Rec., Nov. 8, 1971, Daily Ed., p. S 17828, and statements of Senator Hruska *Id.*, at p. 17857; Senator Cotton, *Id.* at S 17873; and Senator Cooper, *Id.* at S 17884.

[34] The Trade Regulation Rule relating to unsolicited mailing of credit cards (16 C.F.C. 415) was superseded by express provisions in the Truth-In-Lending Act (15 U.S.C. §§ 1642-44, et seq. (1971); the Rule relating to the prevention of unfair or deceptive advertising in labeling of cigarettes (29 F.R. 12626, 15570) was preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 et seq. (1971); and the proposed Rule relating to shipment of unordered merchandise (16 C.F.R. 427) was superseded by express provisions of the Postal Reorganization Act, 39 U.S.C. § 3009 (1971).

[35] Federal Trade Commission v. Colgate Palmolive Co., 380 U.S. 374, 385, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965); Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 617-618, 64 S.Ct. 1215, 88 L.Ed. 1488 (1944); Schechter Poultry Corp. v. United States, 295 U.S. 495, 532-533, 55 S.Ct. 837, 79 L.Ed. 1570 (1935); Federal Trade Commission v. Raladam Co., 283 U.S. 643, 648, 51 S.Ct. 587, 75 L.Ed. 1324 (1931); Federal Trade Commission v. Gratz, 253 U.S. 421, 427, 40 S.Ct. 572, 64 L.Ed. 993 (1920); *See* Comment, 113 U.Pa.L. Rev. 303, 304-305 (1964); R. Burris and H. Teter, Anti-Trust: Rulemaking v. Adjudication in the FTC, 54 Georgetown L.J. 1106 (1965); Weston, Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor, 24 Fed.Bar J. 548 (1964). *But see*, Wegman, Cigarette and Health: A Legal Analysis, 51 Cornell L.Q. 678, 741 (1966); Elman, Rulemaking Procedures in the FTC's Enforcement of the Merger Law, 78 Harv.L.Rev. 385 (1964).

[3] The Court has considered fully all the other arguments put forth by the FTC in this suit. The sum total of their argument is a "bootstrap" operation, designed to conclude that the FTC possesses powers that it clearly does not have. The famous stricture of Mr. Justice Brandeis applies here:

> What the Government asks is not a construction of the statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.[36]

It is therefore the conclusion of this Court, that for the above stated reasons, the statute (FTCA) does not confer upon the Federal Trade Commission the authority to promulgate Trade Regulation Rules that have the effect of substantive law.

Plaintiffs' motion for Summary Judgment is hereby granted.

Defendants' motion for Summary Judgment is hereby denied.

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[36] Iselin v. United States, 270 U.S. 245, 251, 46 S.Ct. 248, 70 L.Ed. 566 (1926).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1446

NATIONAL PETROLEUM REFINERS ASSOCIATION, *et al.*

v.

FEDERAL TRADE COMMISSION *et al.*,
Appellants

ENVIRONMENTAL DEFENSE FUND, INC., CONSUMERS UNION,
AND CONSUMER FEDERATION OF AMERICA,
Intervenors-Appellants

Appeal from the United States District Court
for the District of Columbia

Decided June 27, 1973

Ronald M. Dietrich, General Counsel, Federal Trade Commission, of the bar of the Supreme Court of Illinois, *pro hac vice*, by special leave of court, with whom *Harold H. Titus, Jr.*, United States Attorney, *Harold D. Rhynedance, Jr.*, Assistant General Counsel, Federal Trade Commission, *Miles J. Brown*, Attorney, Federal Trade Commission, and *Morton Hollander* and *William D. Ap-*

pler, Attorneys, Department of Justice, were on the brief, for appellants.

William Simon, with whom *J. Wallace Adair*, *John Bodner, Jr.*, *Robert W. Steele*, *Francis A. O'Brien* and *Roger C. Simmons* were on the brief, for appellees.

Gladys Kessler for intervenors-appellants.

Before BAZELON, *Chief Judge*, and WRIGHT and ROBINSON, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

This case presents an important question concerning the powers and procedures of the Federal Trade Commission. We are asked to determine whether the Commission, under its governing statute, the Trade Commission Act, 15 U.S.C. § 41 *et seq.* (1970), and specifically 15 U.S.C. § 46(g), is empowered to promulgate substantive rules of business conduct or, as it terms them, "Trade Regulation Rules." The effect of these rules would be to give greater specificity and clarity to the broad standard of illegality—"unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce"—which the agency is empowered to prevent. 15 U.S.C. § 45(a). Once promulgated, the rules would be used by the agency in adjudicatory proceedings aimed at producing cease and desist orders against violations of the statutory standard. The central question in such adjudicatory proceedings would be whether the particular defendant's conduct violated the rule in question. *See* 16 C.F.R. § 1.12(c) (1973).

The case is here on appeal from a District Court ruling that the Commission lacks authority under its governing statute to issue rules of this sort. *National Petroleum Refiners Assn* v. *FTC*, D. D.C., 340 F.Supp. 1343 (1972). Jurisdiction in the District Court was based on Section 10 of the Administrative Procedure Act. 5 U.S.C. § 706

(2) (1970). Specifically at issue in the District Court was the Commission's rule declaring that failure to post octane rating numbers on gasoline pumps at service stations was an unfair method of competition and an unfair or deceptive act or practice.[1] The plaintiffs in the District Court, appellees here, are two trade associations and 34 gasoline refining companies. Plaintiffs attacked the rule on several grounds,[2] but the District Court dis-

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[1] The rule provides:

"In connection with the sale or consignment of motor gasoline for general automotive use, in commerce as 'commerce' is defined in the Federal Trade Commission Act, it constitutes an unfair method of competition and an unfair or deceptive act or practice for refiners or others who sell to retailers, when such refiners or other distributors own or lease the pumps through which motor gasoline is dispensed to the consuming public, to fail to disclose clearly and conspicuously in a permanent manner on the pumps the minimum octane number or numbers of the motor gasoline being dispensed. In the case of those refiners or other distributors who lease pumps, the disclosure required by this section should be made as soon as it is legally practical; for example, not later than the end of the current lease period. Nothing in this section should be construed as applying to gasoline sold for aviation purposes.

"NOTE: For the purposes of this section, 'octane number' shall mean the octane number derived from the sum of research (R) and motor (M) octane numbers divided by 2; (R+M)/2. The research octane (R) and motor octane number (M) shall be as described in the American Society for Testing and Materials (ASTM) 'Standard Specifications for Gasoline' D 439-70, and subsequent revisions, and ASTM Test Methods D 2699 and D 2700."

36 FED. REG. 23871 (1971).

[2] In addition to arguing that the Commission lacked statutory authority to promulgate the rule, appellees also charged that the rule was an unconstitutional usurpation of Congress' legislative power; that the procedures under which the rule was adopted deprived them of rights to a hearing allegedly guaranteed by § 5 of the Federal Trade Commission Act, the due process clause of the 5th Amendment, and the Administrative Procedure Act; that the rule lacks factual support; and that promulgating the rule was arbitrary, capricious, and abuse of discretion, and otherwise not in accordance with law.

posed of the case solely on the question of the Commission's statutory authority to issue such rules. That is the only question presented for our consideration on appeal. We reverse and remand to the District Court for further consideration of appellees' challenge to the validity of the procedure before the Commission which resulted in the rule.

I

Our duty here is not simply to make a policy judgment as to what mode of procedure—adjudication alone or a mixed system of rule-making and adjudication, as the Commission proposes—best accommodates the need for effective enforcement of the Commission's mandate with maximum solicitude for the interests of parties whose activities might be within the scope of the statutory standard of illegality. The Federal Trade Commission is a creation of Congress, not a creation of judges' contemporary notions of what is wise policy. The extent of its powers can be decided only by considering the powers Congress specifically granted it in the light of the statutory language and background. *See Textile & Apparel Group* v. *FTC*, 133 U.S.App.D.C. 353, 356-357, 410 F.2d 1052, 1055-1056, *cert. denied*, 396 U.S. 910 (1969). The question to be answered is "not what the [Commission] thinks it should do but what Congress has said it can do." *CAB* v. *Delta Air Lines*, 367 U.S. 316, 322 (1961).

As always, we must begin with the words of the statute creating the Commission and delineating its powers. Section 5 [3] directs the Commission to "prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." [4] Section 5(b) of the Trade Commission Act specifies that the Commission is

[3] 38 STAT. 719 *et seq.* (1914), as amended, 15 U.S.C. § 45 (1970).

[4] 15 U.S.C. § 45(a)(6).

to accomplish this goal by means of issuance of a complaint, a hearing,[5] findings as to the facts, and issuance of a cease and desist order. The Commission's assertion that it is empowered by Section 6(g) to issue substantive rules defining the statutory standard of illegality in advance of specific adjudications does not in any formal sense circumvent this method of enforcement. For after the rules are issued, their mode of enforcement remains what it has always been under Section 5: the sequence of complaint, hearing, findings, and issuance of a cease and desist order. What rule-making does do, functionally, is to narrow the inquiry conducted in proceedings under Section 5(b). It is the legality of this practice which we must judge.

Appellees argue that since Section 5 mentions only adjudication as the means of enforcing the statutory standard, any supplemental means of putting flesh on that standard, such as rule-making, is contrary to the overt legislative design. But Section 5(b) does not use limiting language suggesting that adjudication alone is the only proper means of elaborating the statutory standard. It merely makes clear that a Commission decision, after complaint and hearing, followed by a cease and desist order, is the way to force an offender to halt his illegal activities.[6] Nor are we persuaded by appellees' argument

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[5] 15 U.S.C. § 45(b).

[6] Section 5(b) provides:

"Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the

that, despite the absence of limiting language in Section 5 regarding the role of adjudication in defining the meaning of the statutory standard, we should apply the maxim of statutory construction *expressio unius est exclusio alterius* and conclude that adjudication is the *only* means of defining the statutory standard. This maxim is increasingly considered unreliable, *see Potomac Passengers*

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place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section."

Assn v. *Chesapeake & Ohio R. Co.*, —— U.S.App.D.C. ——, ————, 475 F.2d 325, 331-332 (1973), *cert. granted, sub nom. Nat'l R.R. Passenger Corp.* v. *Nat'l Ass'n of R.R. Passengers*, —— U.S. ——, 41 U.S. L. WEEK 3608 (May 14, 1973), for it stands on the faulty premise that all possible alternative or supplemental provisions were necessarily considered and rejected by the legislative draftsmen. *See American Trucking Assns* v. *United States*, 344 U.S. 298, 309-310 (1953); *Durnin* v. *Allentown Federal Savings & Loan Assn*, E.D. Pa., 218 F.Supp. 716, 719 (1963). Here we have particularly good reason on the face of the statute to reject such arguments. For the Trade Commission Act includes a provision which specifically provides for rule-making by the Commission to implement its adjudicatory functions under Section 5 of the Act. Section 6(g) of the Act, 15 U.S.C. § 46(g), states that the Commission may "[f]rom time to time * * * classify corporations and * * * make rules and regulations for the purpose of carrying out the provisions of sections 41 to 46 and 47 to 58 of this title." [7]

According to appellees, however, this rule-making power is limited to specifying the details of the Commission's nonadjudicatory, investigative and informative functions spelled out in the other provisions of Section 6 [8] and

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[7] 15 U.S.C. § 45 is § 5 of the Trade Commission Act.

[8] Section 6 of the Trade Commission Act provides:

The Commission shall also have power—

(a) Investigation of corporations.

To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) Reports by corporations.

To require, by general or special orders, corporations engaged in commerce, excepting banks and common carriers sub-

ject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the Commission may prescribe, and shall be filed with the Commission within such reasonable period as the Commission may prescribe, unless additional time be granted in any case by the Commission.

(c) Investigation of compliance with antitrust decrees.

Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its finding and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the Commission.

(d) Investigations of violations of antitrust statutes.

Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

(e) Readjustment of business of corporations violating antitrust statutes.

Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

(f) Publication of information; reports.

To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation, and to provide for the publication of its reports and decisions

should not be read to encompass substantive rule-making in implementation of Section 5 adjudications. We disagree for the simple reason that Section 6(g) clearly states that the Commission "may" make rules and regulations for the purpose of carrying out the provisions of Section 5 and it has been so applied. For example, the Commission has issued rules specifying in greater detail than the statute the mode of Commission procedure under Section 5 in matters involving service of process, requirements as to the filing of answers, and other litigation details necessarily involved in the Commission's work of prosecuting its complaints under Section 5. Such rule-making by the Commission has been upheld. *See Hunt Foods & Industries, Inc.* v. *FTC*, 9 Cir., 286 F.2d 803, 810 (1960); *United States* v. *San Juan Lumber Co.*, D. Colo., 313 F.Supp. 703, 708 (1969).

Moreover, the Supreme Court has ruled that the powers specified in Section 6 do not stand isolated from the Commission's enforcement and law-applying role laid out in Section 5. In *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), the Court unanimously rejected arguments that the powers in the two sections are to be exercised separately. There the Court upheld the Commission's

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in such form and manner as may be best adapted for public information and use.

(g) Classification of corporations; regulations.

From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of sections 41 to 46 and 47 to 58 of this title.

(h) Investigations of foreign trade conditions; reports.

To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

15 U.S.C. § 46 (1970).

power to utilize its authority under Section 6(b) to compel the filing of "special reports" to monitor a defendant's compliance with a cease and desist order issued under Section 5. The Commission sought information in such reports to supplement the reports the defendants had been ordered to file by the Court of Appeals which had affirmed the Commission's original cease and desist order. Finding the Commission's request squarely within a commonsense definition of a "special report," the Court reasoned that the power to compel "special reports" means that the agency could "elicit any information beyond the ordinary data of a routine annual report." *Id.* at 650. More importantly, the Court rejected arguments that the legislative history compelled an opposite result, pointing out that while the legislative history did not specifically underwrite this function of "special reports," neither did it explicitly "deny [their] use for any purpose within the duties of the Commission, including a § 5 proceeding." *Id.* at 649. The Court concluded that the Trade Commission Act should be read as an "integrated whole." *Id.* at 650.

A similarly broad construction was given the Commission's powers in *FTC* v. *Dean Foods Co.*, 384 U.S. 597 (1966), where the Commission sought a temporary restraining order and a preliminary injunction against the consummation of a corporate merger against which it was proceeding under Section 5 of the Trade Commission Act and Section 7 of the Clayton Act.[9] The Supreme Court rejected arguments that the Commission lacked the specific authority under its enabling statute to move into court in advance of issuing a cease and desist order and that the Commission, having sought similar powers unsuccessfully from Congress, should not be granted them by judicial implication. *Id.* at 607-611. The Court upheld the Commission's authority to petition Courts of Appeals to ex-

[9] 64 STAT. 1125 (1914), as amended, 15 U.S.C. § 18 (1970).

ercise their power under the All Writs Act, 28 U.S.C. § 1651(a) (1970), to preserve the *status quo* in merger cases pending Commission proceedings. Significantly, for our purposes here, the Court reasoned that, while the Commission was acting without specific statutory warrant, "[s]uch ancillary powers have always been treated as essential to the effective discharge of the Commission's responsibilities." *Id.* at 607.

Of course, it is at least arguable that these cases go no farther than to justify utilizing Section 6(g) to promulgate procedural, as opposed to substantive, rules for administration of the Section 5 adjudication and enforcement powers. But we see no reason to import such a restriction on the "rules and regulations" permitted by Section 6(g). On the contrary, as we shall see, judicial precedents concerning rule-making by other agencies and the background and purpose of the Federal Trade Commission Act lead us liberally to construe the term "rules and regulations." The substantive rule here unquestionably implements the statutory plan. Section 5 adjudications—trial type proceedings—will still be necessary to obtain cease and desist orders against offenders, but Section 5 enforcement through adjudication will be expedited, simplified, and thus "carried out" by use of this substantive rule. And the overt language of both Section 5 and Section 6, read together, supports its use in Section 5 proceedings.

II

Our belief that "rules and regulations" in Section 6(g) should be construed to permit the Commission to promulgate binding substantive rules as well as rules of procedure is reinforced by the construction courts have given similar provisions in the authorizing statutes of other administrative agencies. There is, of course, no doubt that the approved practices of agencies with similar statutory provisions is a relevant factor in arriving at a sound in-

terpretation of the Federal Trade Commission's power here. *See FTC* v. *Dean Foods Co., supra,* 384 U.S. at 607; *FPC* v. *Texaco, Inc.,* 377 U.S. 33, 39-41 (1964). In *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943), for example, the Supreme Court upheld the Federal Communications Commission's chain broadcasting rules regulating programming arrangements between networks and affiliates, in part on the basis of the FCC's generalized rulemaking authority in 47 U.S.C. § 303(r) (1970). *See* 319 U.S. at 217. It rejected arguments similar to those made here, ruling that this authority extended beyond specification of technical and financial qualifications to be used as guides in the administration of the Commission's license-granting power. *Id.* at 220. It permitted the FCC to use rule-making to elaborate the terms of its mandate to pursue the "public convenience, interest, or necessity," 47 U.S.C. § 303, by framing rules carrying out public policy objectives like affiliate independence and avoidance of undue network control over programming in the hope that listeners would be ensured a diversity of program offerings.

United States v. *Storer Broadcasting Co.,* 351 U.S. 192 (1956), took the FCC's rule-making power a step further, holding that applicants for licenses could be rejected before receiving a hearing specified by statute, *see* 47 U.S.C. § 309(b) (1970), in the event they did not comply with the Commission's rule limiting networks' power to own stock in affiliates and did not give sufficient reasons why the rule should be waived. The Court held:

> "We do not read the hearing requirement, however, as withdrawing from the power of the Commission the rulemaking authority necessary for the orderly conduct of its business. * * *
>
> "* * * The Communications Act must be read as a whole and with appreciation of the responsibilities of the body charged with its fair and efficient operation. * * *"

351 U.S. at 202-203. *See also WBEN, Inc.* v. *United States*, 2 Cir., 396 F.2d 601, *cert. denied*, 393 U.S. 914 (1968), upholding the FCC's alteration by rule-making of presunrise broadcasters' permissible operations even though the rule's effect was to modify license holders' operating powers without an individualized hearing specified for cases of license modification by 47 U.S.C. § 316 (1970); *California Citizens Band Assn* v. *United States*, 9 Cir., 375 F.2d 43 (1967), applying the *Storer* doctrine allowing rule-making to alter the powers of citizens radio service licensees without individualized hearings; *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, —— U.S. ——, ——, 41 U.S. L. WEEK 4848, 4851 (June 18, 1973).

Storer and its successors are, of course, closely related to the question we face here. For a major component of appellee's complaint is the abridgement of their interest in having the Trade Commission Act's standard of illegality elaborated only in an adjudicatory context. In our view, this argument was adequately answered in *Storer*, at least to the extent the FTC's rule serves the "purpose of shortening and simplifying the adjudicative process and of clarifying the law in advance," [10] and thus, in *Storer's* language, aids the Commission in the "orderly conduct of its business." [11]

This obvious judicial willingness to permit substantive rule-making to undercut the primacy of adjudication in the development of agency policy is not limited to cases involving the FCC. The Federal Power Commission has successfully utilized rules regulating practical business conduct to frame, and even to cut off, what were once

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[10] Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 962 (1965). *See also Weinberger* v. *Bentex Pharmaceuticals, Inc.*, —— U.S. ——, ——-——, 41 U.S. L. WEEK 4858, 4860-4861 (June 18, 1973).

[11] *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956).

thought to be certificate applicants' absolute rights to individualized adjudications. This practice was upheld in large part on the authority of *Storer* in *FPC* v. *Texaco, Inc., supra.* Similarly, this court has upheld the authority of the Civil Aeronautics Board to utilize substantive rules affecting allocation of air cargo business among different types of air carriers to modify existing certificates without the full adjudicatory hearing contemplated by the agency's statute. *See American Airlines, Inc.* v. *CAB*, 123 U.S.App.D.C. 310, 359 F.2d 624 (1966) (*en banc*). *And see also Air Lines Pilots Assn, Int.* v. *Quesada*, 2 Cir., 276 F.2d 892 (1960), upholding a Federal Aviation Agency regulation barring pilots from service after their 60th birthday without providing for individualized hearings on the resultant modification of their pilots' licenses. The propriety of using rule-making rather than adjudication alone to set substantive regulatory standards has also been approved under the Poultry Products Inspection Act which, like the Federal Trade Commission Act, authorizes an agency, there the Secretary of Agriculture, to promulgate rules and regulations, 21 U.S.C. § 463 (1970), and also provides for specific adjudicatory procedures to determine the existence of misleading food labels, 21 U.S.C. § 457 (1970). *Borden Co.* v. *Freeman*, D. N.J., 256 F.Supp. 592, *affirmed*, 3 Cir., 369 F.2d 404 (1966) (*per curiam*).[12]

Just as there has been little question of allowing substantive rule-making to intrude on asserted rights to a full hearing before an agency for a determination of a party's rights and liabilities, there has been a similar lack of hesitation in construing broad grants of rule-making power to permit promulgation of rules with the force of

[12] *See also Permian Basin Area Rate Cases*, 390 U.S. 747, 774-777 (1968) (upholding authority of FPC to adopt area maximum rate system against challenge that the Natural Gas Act, 15 U.S.C. § 717 *et seq.* (1970), permitted computation of natural gas producers' rates only on an individual basis).

law as a means of agency regulation of otherwise private conduct. *See, e.g., American Trucking Assns* v. *United States, supra,* upholding the Interstate Commerce Commission's authority under the Motor Carrier Act, 49 U.S.C. § 301 *et seq.* (1970), to promulgate rules regulating the use of leased equipment by authorized motor carriers; *Morgan Stanley & Co.* v. *SEC,* 2 Cir., 126 F.2d 325 (1942), upholding SEC rules involving underwriters' commissions in public utility offerings under the Public Utility Holding Company Act, 15 U.S.C. § 79a *et seq.* (1970). Indeed, the general rule courts have adopted toward agencies' use of rule-making power to define standards of conduct by regulated parties, where a general rule-making provision is in the agency statute, was stated succinctly and definitively for this court by Judge Fahy in *Public Service Comm'n of State of New York* v. *FPC,* 117 U.S.App.D.C. 195, 199, 327 F.2d 893, 897 (1964):

> "All authority of the Commission need not be found in explicit language. Section 16 [the general rule-making provision] demonstrates a realization by Congress that the Commission would be confronted with unforeseen problems of administration in regulating this huge industry and should have a basis for coping with such confrontation. While the action of the Commission must conform with the terms, policies and purposes of the Act, it may use means which are not in all respects spelled out in detail. * * *"

The need to interpret liberally broad grants of rule-making authority like the one we construe here has been emphasized time and again by the Supreme Court. Just recently the Court upheld the authority of the Federal Reserve Board to promulgate rules under the Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.* (1970), specifying new cost and financing disclosure requirements for merchants selling goods payable in more than four installments. *Mourning* v. *Family Publications Service, Inc.,*

—— U.S. ——, 41 U.S. L. WEEK 4517 (April 24, 1973). One such rule, promulgated under a general rule-making provision authorizing the Board to "prescribe regulations to carry out the purposes of [the Act]," 15 U.S.C. § 1604, was attacked on the ground that it was inconsistent with some portions of the statute, that the statute itself authorized a disclosure requirement with reference to transactions actually involving a finance charge, and that the Board was exceeding its authority and countermanding the statutory plan by using rule-making power to impose disclosure requirements on credit transactions where nc finance charges are involved. Thus the challenge to the Federal Reserve Board's rule was in some respects similar to the challenge here: we are told that rule-making is authorized with reference to one part of the Federal Trade Commission Act but not another, that the statutory standard of illegality may be enforced only through the case-by-case adjudication specifically mentioned in Section 5 of the Act, and that the grant of rule-making power in Section 6(g) must not be extended to allow elaboration of the Section 5 standard in nonadjudicatory proceedings. But *Mourning* rejected this crabbed, inhospitable construction of a broad grant of rule-making authority, relying in large part on *American Trucking Assns* v. *United States, supra*:

> "To accept respondent's argument would undermine the flexibility sought in vesting broad rule making authority in an administrative agency. In *American Trucking Association*[*s*] v. *United States*, 344 U.S. 298 (1953), we noted that it was not—
>
> > 'a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. . . . [N]o great acquaintance with practical affairs is required to know that such prescience, either in fact or in the minds of Congress, does not exist. [Citations omitted.]

> Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created, for it is the fond hope of their authors that they bring to their work the expert's familiarity with industry conditions which members of the delegating legislature cannot be expected to possess.' 344 U.S., at 309-310.
>
> Neither the sections of the Truth-in-Lending Act which refer specifically to transactions involving finance charges nor any other sections of the Act indicate that Congress attempted to list comprehensively all types of transactions to which the Board's regulations might apply. To the contrary, [the] broad grant of rule making authority [in 15 U.S.C. § 1604] reflects an intention to rely on those attributes of agency administration recognized in *American Trucking*. We cannot then infer that references in the Act to transactions involving credit charges were intended to limit the deterrent measures which the Board might choose."

—— U.S. at ——, 41 U.S. L. WEEK at 4522-4523.

Thus there is little question that the availability of substantive rule-making gives any agency an invaluable resource-saving flexibility in carrying out its task of regulating parties subject to its statutory mandate. More than merely expediting the agency's job, use of substantive rule-making is increasingly felt to yield significant benefits to those the agency regulates. Increasingly, courts are recognizing that use of rule-making to make innovations in agency policy may actually be fairer to regulated parties than total reliance on case-by-case adjudication.

The Supreme Court made this suggestion initially in *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), where it dealt with an agency adjudication imposing novel restraints on the power of management corporations to purchase stock during periods of reorganization under the Public Utility Holding Company Act of 1935. While

the Court did not hold that the Securities and Exchange Commission was bound to follow rule-making procedures in making such a marked policy departure, it was clearly aware that exclusive reliance on adjudication could be criticized for unfairly focusing on a single defendant in a restricted proceeding when promulgating a new policy with industry-wide ramifications. The Court said:

> "* * * The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. * * *"

332 U.S. at 202.

Four years ago a majority of the Supreme Court hinted that there may be circumstances where agency policy innovations should be made *only* in rule-making proceedings. In *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969), the Court upheld an adjudicatory order based on a prior decision where the Labor Board had decided that a new rule of management conduct during election campaigns should operate only prospectively. But the four-man plurality opinion by Mr. Justice Fortas sharply criticized the Board's initial promulgation in adjudicatory proceedings of a rule applicable in election campaigns generally. He argued that rule-making, under the Administrative Procedure Act's provisions for advance notice and broad public participation, 5 U.S.C. § 553 (1970), assured "fairness and mature consideration" in a way that adjudication, inevitably tending to focus more narrowly on the behavior of given parties, could not. 394 U.S. at 764. Mr. Justice Douglas, dissenting from the majority's actual holding, argued similarly that where the Board imposed a new standard of conduct that is "not particularized to special facts * * * [but] is a statement of far-reaching policy covering all future representation elections," *id.* at 777, it should be required to follow the APA's rule-making procedures. He stressed that rule-making, un-

like adjudication, "gives notice to an entire segment of society of those controls or regimentation that is forthcoming * * * [and] an opportunity for persons affected to be heard." *Ibid.* And since the agency is bound under the APA to consider the submissions of those affected between the time a rule is proposed and when it is promulgated, 5 U.S.C. § 553(c), (d), it has a valuable opportunity to modify its initial inclinations. In other words, by exposing itself to a wider range of criticism and advice than is ordinarily available in adjudicatory proceedings the agencies may, in Mr. Justice Douglas' words, "discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice." *Id.* at 777-778. Also dissenting, Mr. Justice Harlan said that where the agency had taken the position that its new adjudication-based rule was so revolutionary that it could be applied only prospectively, such marked departures in agency policy could only be taken through rule-making: "Either the rule-making provisions [of the APA] are to be enforced or they are not. Before the Board may be permitted to adopt a rule that so significantly alters pre-existing labor-management understandings, it must be required to conduct a satisfactory rule-making proceeding, so that it will have the benefit of wide-ranging argument before it enacts its proposed solution to an important problem." *Id.* at 781.

Even more recently, the Second Circuit has taken *Wyman-Gordon's* suggestions to their logical conclusion. In *Bell Aerospace Div. of Textron, Inc.* v. *NLRB*, 2 Cir., 475 F.2d 485 (1973), that court refused to enforce a Labor Board bargaining order in part on the ground that the Board had made such a significant change in its previous definition of types of workers protected by the National Labor Relations Act that rule-making rather than adjudication was required. In holding that the agency "should be particularly sure that it has all avail-

able information," 475 F.2d at 497, Chief Judge Friendly's opinion ordering rule-making, *id.* at 496, relied heavily on a factor stressed in the opinions of Justices Fortas, Douglas and Harlan in *Wyman-Gordon*—a sharp change in agency policy with obvious effects on a vastly wider range of parties than those immediately before the agency. *Id.* at 496-497. Moreover, he stressed that the argument for mandatory rule-making was especially strong where the defendant was exposed by the adjudicatory order to "new and unexpected liability." *Id.* at 497.

This judicial trend favoring rule-making over adjudication for development of new agency policy does not, of course, directly dispose of the question before use. There was no question that the SEC in *Chenery* had substantive rule-making powers. *See* 332 U.S. at 201. And *Wyman-Gordon* assumed that the NLRB also had substantive rule-making powers under 29 U.S.C. § 156 (1970). 394 U.S. at 763-765 & n.3. Here we must decide just that question, whether Congress has given the FTC the same alternate means of proceeding, not whether the FTC should be required to use rule-making in some circumstances. But *Chenery*, *Wyman-Gordon* and *Bell-Aerospace* cannot be ignored, for they indisputably flesh out the contemporary legal framework in which both the FTC and this court operate and which we must recognize. *See Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 390-391 (1970). To us, these cases suggest that contemporary considerations of practicality and fairness—specifically the advisability of utilizing the Administrative Procedure Act's rule-making procedures to provide an agency about to embark on legal innovation with all relevant arguments and information, 5 U.S.C. § 553—certainly support the Commission's position here. As *Wyman-Gordon* and *Bell Aerospace* explicitly noted, utilizing rule-making procedures opens up the process of agency policy innovation to a broad range of criticism, advice and data that is ordinarily less likely to be forthcoming

in adjudication. Moreover, the availability of notice before promulgation and wide public participation in rulemaking avoids the problem of singling out a single defendant among a group of competitors for initial imposition of a new and inevitably costly legal obligation, *cf. FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244 (1967); *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411 (1958).

Such benefits are especially obvious in cases involving initiation of rules of the sort the FTC has promulgated here. The Commission's statement on basis and purpose indicated that the decision to impose the obligation of octane rating disclosure on gasoline dealers entailed careful consideration of automobile engine requirements, automobile dealers' practices in instructing purchasers how to care for their engines, consumer gasoline purchasing habits, and costs to gasoline dealers. In addition, the Commission had to choose exactly what kind of disclosure was the fairest. In short, a vast amount of data had to be compiled and analyzed, and the Commission, armed with these data, had to weigh the conflicting policies of increasingly knowledgeable consumer decision-making against alleged costs to gasoline dealers which might be passed on to the consumer. True, the decision to impose a bright-line standard of behavior might have been evolved by the Commission in a single or a succession of adjudicatory proceedings, *see, e.g., FTC* v. *Texaco, Inc.*, 393 U.S. 223 (1968), much as the Supreme Court has imposed *per se* rules of business behavior in antitrust cases. *See, e.g., United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972) (horizontal territorial restraints); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (price fixing). But evolution of bright-line rules is often a slow process and may involve the distinct disadvantage of acting without the broad range of data and argument from all those potentially affected that may be flushed out through use of legislative-type rule-making procedures. *Cf. United States* v *Topco Associates, Inc.*,

supra, 405 U.S. at 620 (Mr. Chief Justice Burger, dissenting). And utilizing rule-making in advance of adjudication here minimizes the unfairness of using a purely case-by-case approach requiring "compliance by one manufacturer while his competitors [engaging in similar practices] remain free to violate the Act." *Weinberger* v. *Bentex Pharmaceuticals, Inc.*, *supra*, —— U.S. at ——, 41 U.S. L. WEEK at 4861. In light of *Chenery*, *Wyman-Gordon* and *Bell Aerospace*, therefore, it is hard to escape noting that the policy innovation involved in this case underscores the need for increased reliance on rule-making rather than adjudication alone.

III

Appellees contend, however, that these cases and the general practice of agencies and courts in underwriting the broad use of rule-making are irrelevant to the FTC. They argue that the Trade Commission is somehow *sui generis*, that it is best characterized as a prosecuting rather than a regulatory agency, and that substantive rule-making power should be less readily implied from a general grant of rule-making authority where the agency does not stand astride an industry with pervasive license-granting, rate-setting, or clearance functions. Initially it should be noted that appellees, for obvious reasons, do not rely on the NLRB in making their prosecutorial argument. The statutory method of adjudication and enforcement used by the NLRB is, of course, very similar to that of the FTC. *Compare* 29 U.S.C. § 160 (1970) *with* 15 U.S.C. § 45. And the courts, including the Supreme Court, have, as shown in the preceding section, repeatedly encouraged the NLRB to make use of its general grant of rule-making authority, 29 U.S.C. § 156, to issue substantive rules. We do not assert that the FTC is compelled by its statutory charter to exert the kind of ongoing regulatory scrutiny exercised by agencies like the FCC, FPC, ICC, SEC, CAB, or even the Department

of Agriculture. But we do not find the absence of license-granting, rate-making or clearance power a sufficiently principled distinction to accept appellees' argument. For a more compelling argument can be made that the FTC's duty to prevent "unfair methods of competition" and "unfair or deceptive acts or practices" is just as potentially pervasive, in the sense of affecting commercial practices, as the regulatory schemes of agencies utilizing rate-making, licensing, and similar means of regulation. The FTC's charter to prevent unfair methods of competition is tantamount to a power to scrutinize and to control, subject of course to judicial review, the variety of contracting devices and other means of business policy that may contradict the letter or the spirit of the antitrust laws. *FTC* v. *Brown Shoe Co.*, 384 U.S. 316, 320-322 (1966); *FTC* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 394-395 (1953); *FTC* v. *Cement Institute*, 333 U.S. 683, 689-695 (1948). The pervasiveness of the antitrust laws' coverage, in the sense of affecting business decision-making, needs no elaboration. Suffice it to say that it cuts deeply into and, with limited exceptions,[13] widely across virtually all of American business. In addition, under its mandate to prevent "unfair or deceptive acts or practices," the Commission has the responsibility to protect the consumer from being misled by governing the conditions under which goods and services are advertised and sold to individual purchasers. *See FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 239-244 (1972). And while the boundaries of the Commission's power to proscribe conduct it deems harmful to the consumer or to competition are not clearly defined, they are indeed expansive. *Id.* at 244.

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[13] The Federal Trade Commission Act exempts from its coverage banks, common carriers subject to other federal regulation, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons subject to the Packers and Stockyards Act of 1921. *See* 15 U.S.C. § 45(a)(6).

Given the expanse of the Commission's power to define proper business practices, we believe it is but a quibble to differentiate between the potential pervasiveness of the FTC's power and that of the other regulatory agencies merely on the basis of its prosecutorial and adjudicatory mode of proceeding. Like other agencies, wholly apart from the question of rule-making power it exerts a powerfully regulatory effect on those business practices subject to its supervision. Of course, its regulatory authority is not complete. But neither is the regulation exercised by other agencies. *See J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964). And the Commission has this regulatory effect irrespective of whether it chooses to elaborate the vague but comprehensive statutory standards through rule-making or through case-by-case adjudication. Businesses whose practices appear clearly covered by the Trade Commission's adjudicatory decisions against similarly situated parties presumably will comply with the Commission's holding rather than await a Commission action against them individually; we must presume that in many cases where a guideline is laid down in an individual case it is, like many common law rules, generally obeyed by those similarly situated. Moreover, there are ample indications in the Commission's legislative history that the agency, by gathering information on business practices, issuing periodic reports, and moving against those practices which appear "unfair," was meant to have just this sort of regulatory impact, despite the purely prosecutorial mode of proceeding provided in Section 5 of the Act.[14] Not only is the Commission's regulatory power much broader than appellees would have us believe; there is simply no compelling evidence in the Act's legislative history or in the language of the statute itself which would limit the exercise of that power to the

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[14] *See, e.g.*, S. Rep. No. 597, 63d Cong., 2d Sess., 9-10 (1914); H. R. Rep. No. 1142, 63d Cong., 2d Sess., 18-19 (1914).

prosecutorial function or prevent the Commission from making that function more effective by rule-making.

IV

Although we believe there are thus persuasive considerations for accepting the FTC's view that the plain meaning of the statute supports substantive rule-making, the question is not necessarily closed. For appellees' contention—that the phrase "rules and regulations for the purpose of carrying out" Section 5 refers only to rules of procedure and practice for carrying out the Commission's adjudicatory responsibility—is not implausible. The opinion of the District Court argues forcefully that, in spite of the clear and unlimited language of Section 6(g) granting rule-making authority to the Commission, the Congress that enacted Section 5 and Section 6(g) gave clear indications of its intent to reject substantive rule-making, that the FTC's own behavior in the years since that time supports a narrow interpretation of its mandate to promulgate "rules and regulations," and that where Congress desired to give the FTC substantive rule-making authority in discrete areas it did so in subsequent years in unambiguous terms. Our own conclusion, based on an independent review of this history, is different. We believe that, while the legislative history of Section 5 and Section 6(g) is ambiguous, it certainly does not compel the conclusion that the Commission was not meant to exercise the power to make substantive rules with binding effect in Section 5(a) adjudications. We also believe that the plain language of Section 6(g), read in light of the broad, clearly agreed-upon concerns that motivated passage of the Trade Commission Act, confirms the framers' intent to allow exercise of the power claimed here. We do not find the District Court's reliance on the agency's long-standing practice, until 1962, of not utilizing rule-making or the District Court's reliance on enactment of

specific grants of rule-making power in narrow areas sufficiently persuasive to override our view, and the Commission's view, that rule-making is not only consistent with the original framers' broad purposes, but appears to be a particularly apt means of carrying them out.

In analyzing the origins of the Federal Trade Commission Act of 1914, and Section 5 and 6(g) in particular, both parties would have us focus heavily on the floor debates and committee reports that accompanied the legislation on its tortuous path toward enactment. Certainly these materials are relevant to our inquiry and cannot be ignored. But our examination of the comments made by legislators that allegedly bear directly on the question whether the Commission was initially meant to exercise substantive, legislative-type rule-making power has led us to the conclusion, familiar in cases dealing with strongly contested questions of statutory interpretation, that the *specific* intent of Congress here cannot be stated with any assurance. The materials cited to us indicate that the question before us—whether the Commission can elaborate the meaning of Section 5's standard of illegality through rule-making as well as through case-by-case adjudication—was not confronted straightforwardly and decisively. Given this conclusion, which we elaborate in detail in the appendix to this opinion, we are hardly at liberty to override the plain, expansive language of Section 6(g) as well as the gloss that has been placed on that kind of rule-making provision by the series of decisions dealing with agencies whose enabling statutes have similar rule-making provisions. *See United States* v. *Oregon*, 366 U.S. 643, 647-648 (1961).

Moreover, while we believe the historical evidence is indecisive of the question before us, we are convinced that the broad, undisputed policies which clearly motivated the framers of the Federal Trade Commission Act of 1914 would indeed be furthered by our view as to the

proper scope of the Commission's rule-making authority. The multiplicity of differing plans proposed for a trade commission prior to 1914 [15] and during the intensive de-

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[15] *See* S. 2941, 62d Cong., 2d Sess. (1911). This bill, introduced by Senator Newlands of Nevada, then a ranking member of the Senate Commerce Committee, provided for a 5-man independent commission whose presidentially appointed members would have fixed tenure, with powers to compel corporations whose annual gross receipts exceeded $5 million to furnish annual reports showing their "organization, financial condition, and operations as may be prescribed by regulations to be made in pursuance of this act." Such corporations, moreover, would be subject to a federal registration requirement, and registration could be revoked upon a commission finding that they had engaged in "unfair or oppressive methods of competition," or suffered from "overcapitalization" or "improper financial organization." Application of these standards to the facts of any given corporation was left to the commission. Finally, the commission was empowered under the plan to order that a defendant corporation found liable "thereafter shall not engage in interstate commerce." This order was enforceable by fine and injunction in the federal district courts. Although this stringent legislation was not voted upon during the session, it does serve to indicate serious unease with the existent policy of entrusting the courts with exclusive responsibility for antitrust enforcement. A subsequent proposal, S. 5485, 62d Cong., 2d Sess. (1912), provided for a commission without any independent enforcement authority, but with power to investigate and report publicly on corporate financial and business practices, to recommend antitrust prosecutions to the Department of Justice, and to assist the federal courts, as a sort of special master, in framing decrees of dissolution or reorganization once underlying antitrust liability under the Sherman Act had been found. Stronger legislation was introduced in the House in 1913, H.R. 9299, H.R. 9300 & H.R. 9301, 63d Cong., 1st Sess. (1913), by the Progressive Party leader, Congressman Murdock of Kansas. These bills would create a commission with power to issue orders restraining unfair competitive practices that would be enforceable in federal courts, but these bills too were not reported to the floor. Moreover, the platforms of both the Republican and the Progressive Parties in the 1912 election called for establishment of a commission. The Republicans called for a "Federal trade commission, thus placing in the hands of an administrative board many of the functions now necessarily exercised by the courts. This will promote promptness in the administration of the laws and avoid delays and technicalities incident to court procedure." Quoted in H.R. Rep. No. 533, 63d Cong., 2d Sess., Views of the Minority, 1 (1914). The Progressives called for a "commission of high standing, which shall

bates in 1914 [16] immediately preceding enactment of the Trade Commission Act demonstrates, of course, that proponents of the agency were hardly agreed on exactly what powers the agency should assume. But the variety of plans and the proponents of the agency all unquestionably shared deep objections to the existing structure of judicial monopolization of cases involving unfair, anticompetitive business practices. Those who believed from the start in a commission with independent enforcement powers,[17] as the Commission was finally given in the

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maintain permanent active supervision over industrial corporations engaged in interstate commerce, * * * doing for them what the Government now does for national banks, and what is now done for the railroads by the Interstate Commerce Commission." Quoted in *id.*, Part 3, at 2. The 1912 Democratic platform signally failed to promote a trade commission, though it did call for greater specificity in the antitrust laws. *See* G. HENDERSON, THE FEDERAL TRADE COMMISSION; A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE 16 (1924). The reluctance of the Democrats, including President Wilson, to embrace plans for an independent commission was based on several grounds. First, throughout his campaign Mr. Wilson opposed creation of a new agency to suprevise corporate behavior simply on the ground that additional bureaucracy was undersirable *per se*. *See* A. LINK, WILSON: THE NEW FREEDOM 327 (paper ed. 1956). Second, the Progressive Party plan for a commission treating large trusts as corporations with a "public use" appeared to contemplate an extraordinary degree of regulation, including licensing and price control. Such supervision raised the spectre of possible governmental immunization, through regulation, of monopolistic practices from more straightforward legal attack. *See* G. HENDERSON, *op. cit. supra*, at 22-24.

[16] *See* Appendix at pp. 51-54 *infra*.

[17] Senator Newlands, for example, stated in a hearing before the Senate Committee on Interstate Commerce on Aug. 4, 1911, that his bill, S. 2941, *supra* note 15, would allow the commission to achieve ends that had eluded the courts:

> "* * * We want traditions; we want a fixed policy; we want trained experts; we want precedents; we want a body of administrative law built up. This can not be well done by the single occupant of an office, subject to constant changes in its incumbancy and subject to higher executive authority. Such work must be done by a board or commission of dignity, per-

> manence, and ability, independent of executive authority, except in its selection, and independent in character."

Quoted in Appendix to S. Rep. No. 597, *supra* note 14, at 22.

President Wilson did not originally back proposals giving a trade commission independent enforcement power. When he announced his antitrust program in an address to Congress on Jan. 20, 1914, 51 CONG. REC. (Part 2) 1963 (1914), he relented his campaign opposition to any new commission. But the agency he proposed had no independent enforcement power, as had been proposed in 1911 and 1913, *see* note 15 *supra*, and was clothed with merely investigative and publicity powers, "a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided," 51 CONG. REC. (Part 2) at 1963. He also proposed permitting the commission to assist the courts and the Justice Department in framing decrees and settlements. His rejection of any agency with its own enforcement power was seemingly based on fears that it might thus be "empowered to make terms with monopoly or * * * to assume control of business." *Id.*

Those who felt that Wilson did not go far enough sharply disagreed with the President's apparent willingness to leave powers of enforcement exclusively to the courts. Congressman Stevens of New Hampshire, whose views subsequently helped change the President's opposition to a commission with independent enforcement power, *see* A. LINK, *op. cit. supra* note 15, at 436-438, refused to sign the majority report of the House Committee on Interstate Commerce when it reported out the Administration's original proposal for a commission without any independent enforcement power. He stressed that the "regulation of large corporations by suits at law is a slow, costly process and even where the Government has eventually won, the results have been most disappointing," and that only an "administrative board having general power to prevent unfair competitive practices" could ameliorate this problem. H.R. Rep. No. 533, *supra* note 15, Part 2 at 1. On the House floor, members who opposed the President's bill on the ground that it gave the commission insufficient power made similar arguments, namely, that the commission, as proposed, simply did not strike at the core problem of antitrust enforcement. Congressman Murdock of Kansas, a leading Progressive, sharply attacked the original Administration plan:

> "The pending Democratic measures, save for a mere rudimentary and purely investigative trade commission, which is to go hunting in the trust jungles—with a camera—leave all the work to the lingering, laborious, inexpert adjustments of the overcrowded courts."

1914 legislation, and those who believed the Commission should have lesser powers,[18] agreed that entrusting en-

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51 CONG. REC. (Part 9) 8973 (1914). Murdock argued that the Administration's supplement to its original trade commission proposal, a set of laws specifying in greater detail anticompetitive practices, was defective precisely because the new proposals were to be "enforced only by the long, difficult, delaying processes of the courts." *Id.* at 8974. Congressman Dillon of South Dakota, another proponent of a stronger commission, argued that giving enforcement power to the commission would avoid this problem:

> "* * * If we rely on the judiciary, our progress must necessarily be slow. We prefer to place our hopes and aspirations in an administrative board, a board that would not be hampered by appeals, delays, and technicalities."

Id. at 9057.

Criticism of exclusive reliance on judicial enforcement of the antitrust laws was equally evidence when Wilson changed his mind after passage of the weak commission bill in the House and backed a commission with independent enforcement authority. *See generally* Appendix at pp. 55-58 *infra*. The report of the Senate Commerce Committee, chaired by Newlands, endorsing the latter plan argued that a commission composed of members familiar with the problems of business competition "could be vastly more effectual than through the courts alone, which in most cases will take no cognizance of violations of the law for months or years after the violations occurred, and when the difficulty of awarding reparation for the wrong is almost unsurmountable." S.Rep. No. 597, *supra* note 14, at 5-6. During the subsequent floor debate, Senator Saulsbury of Delaware, who subsequently served on the conference committee which produced the final bill, argued in favor of a commission with its own enforcement power on the ground that "[t]he delays and expense incident to obtaining redress for such wrongs in the courts have made adequate relief to litigants almost unattainable in these cases and, in the public mind there has been growing up a belief, which to some extent may be justified, that the courts were not efficient, because of the usual delay and expense in providing early, adequate, and inexpensive relief from oppressions." 51 CONG. REC. (Part 12) 11593 (1914).

[18] Congressman Covington of Maryland, the floor manager of the Administration's original proposal which gave the commission no independent enforcement power, said as much on the House floor shortly after a bill embodying the Administration's plans reported out from committee when he described the problems that ensued in

forcement of congressional policy to prevent undue incursions on competition exclusively to the courts was a serious mistake. The courts were said to lack sufficient expertise in matters of economic complexity,[19] their decisions were said to be wanting in the clarity planners of complicated business transactions and innovations required,[20] and finally and most importantly, the courts lacked both the resources and the skill to proceed with speed and expedition in the trial and disposition of complicated cases involving economic questions.[21] This concern over judicial delay, inefficiency and uncertainty was echoed time and again throughout the 1914 debates over the form a commission would take.[22]

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attempting to render a decree of dissolution in one notable antitrust case:

> "* * * [B]y reason of the lack of an efficient body charged with the handling of the numerous facts relating to all those tobacco concerns and assisting the court, a delay was caused and an imperfect decree resulted. If Judge Lacombe had been able to refer to a commission of the sort now proposed the whole record in the case and obtain a report concerning the form of a proper constructive decree of dissolution, the public would have been more speedily and more effectively served."

51 CONG. REC. (Part 9) at 8846-8847. The Senate Commerce Committee, while it decided not to report S. 5485, discussed at note 15 *supra*, noted that the bill's feature of permitting the commission to act as a sort of special master in assisting the federal courts to frame decrees of dissolution or settlement in Sherman Act cases would serve as a partial cure for "judicial deliberation and delay," ensuring that violations would be promptly attacked and remedies imposed quickly if they were needed. S. Rep. No. 1326, 62d Cong., 3d Sess. (1913), quoted in Appendix to S. Rep. No. 597, *supra* note 14, at 33.

[19] *See* statements of Senator Newlands and Congressman Murdock, quoted in note 17 *supra*. *See also* H.R. Rep. No. 1142, *supra* note 14, at 19; S. Rep. No. 597, *supra* note 14, at 6, 8-10, 12, 13.

[20] *See generally* G. HENDERSON, *op. cit. supra* note 15, at 11-15.

[21] *See* note 17 *supra*.

[22] *See* notes 17-19 *supra*.

In determining the legislative intent, our duty is to favor an interpretation which would render the statutory design effective in terms of the policies behind its enactment and to avoid an interpretation which would make such policies more difficult of fulfillment, particularly where, as here, that interpretation is consistent with the plain language of the statute. *See Bird* v. *United States*, 187 U.S. 118, 124 (1902); *United States* v. *Blasius*, 2 Cir., 397 F.2d 203, 207 n.9 (1968), *cert. dismissed*, 393 U.S. 1008 (1969). "[I]n the absence of an unmistakeable directive," we cannot "construe the Act in a manner which runs counter to the broad goals which Congress intended it to effectuate." *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968). Indeed, as Mr. Justice Harlan put it in a case involving a question of the Federal Power Commission's power under a general rule-making provision to alter radically its customary modes of proceeding, "This Court has repeatedly held that the width of administrative authority must be measured in part by the purposes for which it was conferred." *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968); *see also id.* n.40; *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 277-281 (1969) (upholding rules of the United States Department of Housing and Urban Development promulgated pursuant to a rule-making provision, 42 U.S.C. § 1408 (1970), phrased in terms almost identical with those of Section 6(g) of the Trade Commission Act). This view was reiterated just a few weeks ago by Mr. Chief Justice Burger, writing for the Court:

> "* * * Where the empowering provision of a statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of this Act,' we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.' * * *"

Mourning v. *Family Publications Service, Inc.*, *supra*, —— U.S. at ——, 41 U.S. L. WEEK at 4521. (Footnote omitted.) In short, where a statute is said to be susceptible of more than one meaning, we must not only consult its language; we must also relate the interpretation we provide to the felt and openly articulated concerns motivating the law's framers. *See J. I. Case Co.* v. *Borak*, *supra*, 377 U.S. at 432-433. In this way we may be sure we are construing the statute rather than constructing a new one.

The problems of delay and inefficiency that proponents of both a strong and a weak commission aimed to eliminate or minimize have plagued the Trade Commission down to the present. While the Commission has broad common law-like authority to delineate the scope of the statute's prohibitions, *see FTC* v. *Sperry & Hutchinson Co.*, *supra*, 405 U.S. at 244, like the federal courts it was designed to supplement, it has remained hobbled in its task by the delay inherent in repetitious, lengthy litigation of cases involving complex factual questions under a broad legal standard. Close students of the agency agree that the historic case-by-case purely adjudicatory method of elaborating the Section 5 standard and applying it to discrete business practices has not only produced considerable uncertainty, *see* REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 11 (1969); Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 383, 445-449, 464-465, 518-519 (1964); Cushman, *The Problem of the Independent Regulatory Commissions* 24 *in* PRESIDENT'S COM'N ON ADMINISTRATIVE MANAGEMENT, STUDIES NO. 1-5 (1937); Baum, *Reorganization, Delay and the Federal Trade Commission*, 15 ADMIN. L. REV. 92, 93, 108-110 (1963), but also has helped to spawn litigation the length of which has frequently been noted ruefully by commentators on the Commission's perform-

ance. *See* Note, *The Federal Trade Commission and Reform of the Administrative Process*, 62 COLUM. L. REV. 671, 692-693 (1962); REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION, *supra*, at 10, 28-32. We believe that, to the extent substantive rule-making to implement Section 5 proceedings is likely to deal with these problems given the statutory authority provided in Section 6(g), the Commission's position should be upheld as a reasonable means of attacking ills the Commission was created to cure.

There is little disagreement that the Commission will be able to proceed more expeditiously, give greater certainty to businesses subject to the Act, and deploy its internal resources more efficiently with a mixed system of rule-making and adjudication than with adjudication alone. With the issues in Section 5 proceedings reduced by the existence of a rule delineating what is a violation of the statute or what presumptions the Commission proposes to rely upon, proceedings will be speeded up. For example, in an adjudication proceeding based on a violation of the octane rating rule at issue here, the central question to be decided will be whether or not pumps owned by a given refiner are properly marked. *See also* pages 37-38 *infra*. Without the rule, the Commission might well be obliged to prove and argue that the absence of the rating markers in each particular case was likely to have injurious and unfair effects on consumers or competition.[23] Since this laborious process might well have to be repeated every time the Commission chose to proceed subsequently against another defendant on the same ground, the difference in administrative efficiency between the two kinds of proceedings is obvious. Furthermore, rules, as contrasted with the holdings reached by case-by-case adjudication, are more spe-

[23] *See* Case Note, 14 B.C. IND. & COMM. L. REV. 368, 379 (1972). *But cf. FTC* v. *Texaco, Inc.*, 393 U.S. 223 (1968).

cific as to their scope, and industry compliance is more likely simply because each company is on clearer notice whether or not specific rules apply to it. Moreover, when delay in agency proceedings is minimized by using rules, those violating the statutory standard lose an opportunity to turn litigation into a profitable and lengthy game of postponing the effect of the rule on their current practice.[24] As a result, substantive rules will protect the companies which willingly comply with the law against what amounts to the unfair competition of those who would profit from delayed enforcement as to them. This, too, will minimize useless litigation and is likely to assist the Commission in more effectively allocating its resources. In addition, whatever form rules take, whether bright-line standards or presumptions that are rebuttable, they are likely to decrease the current uncertainty many businesses are said to feel over the current scope and applicability of Section 5.[25] But the important point here is not that rule-making is assuredly going to solve the Commission's problems. It is rather than recognition and use of rule-making by the Commission is convincingly linked to the goals of agency expedition, efficiency, and certainty of regulatory standards that loomed in the background of the 1914 passage of the Federal Trade Commission Act. This relationship between rule-making's probable benefits and the broad concerns evident when the FTC was created, together with the express language of Section 6(g), help persuade us that any purported ambiguity

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[24] Address by FTC Chairman Paul Rand Dixon, American Association of Advertising Agencies, April 28, 1962, quoted in Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 383, 456 (1964); Shapiro, *supra* note 10, 78 HARV. L. REV. at 962.

[25] *See* REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 11 (1969); Elman, *Rulemaking Procedures in the FTC's Enforcement of the Merger Law*, 78 HARV. L. REV. 385 (1964).

of the statute must be resolved in favor of the Commission's claim.

V

Despite the import of Section 6(g)'s plain language, the overwhelming judicial support given to expansive agency readings of statutory rule-making authorizations that are not flatly inconsistent with other statutory provisions, and the incontestable relationship between the broad policies behind the 1914 Act and the utility of substantive rule-making power, appellees argue that substantive rule-making represents a sufficiently important innovation in Commission practice for us to balk at authorizing its use on the basis of an arguably ambiguous statute in the absence of very firm indications of affirmative and specific legislative intent. Indeed, courts have assumed such a stance toward novel assertions of agency powers. This court did so in *Textile & Apparel Group* v. *FTC*, *supra*, where we reviewed an agency rule allowing for *ex parte* seizure of imports at Customs and a procedure for testing goods prior to entry, both without provision for the Trade Commission's normal enforcement procedure of adversary cease-and-desist proceedings and judicial review. Because this procedure entirely dispensed with a hearing and because it varied so sharply from the Commission's customary mode of proceeding against possible wrongdoers, we structured our review to "look for some fairly strong indication, backed by sound policy, that Congress meant for the Commission to act in this way." 133 U.S.App.D.C. at 356, 410 F.2d at 1055. *See also FMC* v. *Anglo-Canadian Shipping Co.*, 9 Cir., 335 F.2d 255, 258-259 (1964) (involving agency use of prehearing discovery procedures).

Unlike either *Textile & Apparel Group* or *Anglo-Canadian Shipping Co.*, this case does not involve nearly so drastic a departure from accustomed modes of agency proceeding. The rule here does not bypass the Commis-

sion's statute-based cease-and-desist proceedings. It merely supplements them. Moreover, in light of the concern evident in the legislative history that the Commission give attention to the special circumstances of individual businesses in proceeding against them, *see* Appendix at pages 63-65, the Commission should administer any rules it might promulgate in much the same way that courts have ordinarily required other agencies to administer rules that operate to modify a regulated party's rights to a full hearing. That is, some opportunity must be given for a defendant in a Section 5 proceeding to demonstrate that the special circumstances of his case warrant waiving the rule's applicability, as where the rationale of the rule does not appear to apply to his own situation or a compelling case of hardship can be made out. *See FPC* v. *Texaco, Inc., supra*, 377 U.S. at 40; *United States* v. *Storer Broadcasting Co., supra*, 351 U.S. at 205; *Gulf Oil Corp.* v. *Hickel*, 140 U.S.App.D.C. 368, 375, 435 F.2d 440, 447 (1970); *WAIT Radio* v. *FCC*, 135 U.S.App.D.C. 317, 321, 418 F.2d 1153, 1157 (1969); *Sun Oil Co.* v. *FPC*, 5 Cir., 355 F.2d 181, 183 (1965). *See generally* Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1329-1330 (1972); Note, *The Use of Agency Rulemaking to Deny Adjudications Apparently Required by Statute*, 54 IOWA L. REV. 1086, 1104-1105, 1115-1119 (1969).

Moreover, as we have pointed out, substantive rulemaking is a widely utilized practice throughout our administrative agencies, and its use has been upheld even in cases where its use appears to conflict with regulated parties' adjudicatory rights, as in *Storer*, *Texaco, Inc.* and their successors. In dealing with this apparent conflict of private parties' adjudicatory rights and the agencies' interests in promulgating clear policy guidelines to provide notice to an industry and to avoid time-consuming individualized hearings on issues that are com-

mon in that industry, courts have stressed the advantages of efficiency and expedition which inhere in reliance on rule-making instead of adjudication alone. *See FPC* v. *Texaco, Inc., supra*, 377 U.S. at 44; *American Airlines, Inc.* v. *CAB, supra*, 123 U.S.App.D.C. at 315, 359 F.2d at 629. Furthermore, under the Administrative Procedure Act the public, including all parties in the industry who might be affected, are given a significant opportunity prior to promulgation of a rule to ventilate the policy and empirical issues at stake through written submissions, at a minimum, *see* 5 U.S.C. § 553, or more, as here, where the agency permitted oral argument in a nonadjudicatory setting. Finally, any rules promulgated by the agency are subject to judicial review testing their legality and ensuring that they are within the scope of the broad statutory prohibition they purport to define.

Any fears that the agency could successfully use rule-making power as a means of oppressive or unreasonable regulation seem exaggerated in view of courts' general practice in reviewing rules to scrutinize their statement of basis and purpose to see whether the major issues of policy pro and con raised in the submissions to the agency were given sufficient consideration. *Automotive Parts & Accessories Assn* v. *Boyd*, 132 U.S.App.D.C. 200, 208-213, 407 F.2d 330, 338-343 (1968). *See also City of Chicago, Ill.* v. *FPC*, 147 U.S.App.D.C. 312, 322-326, 458 F.2d 731, 741-745 (1971), *cert. denied*, 405 U.S. 1074 (1972). The Commission is hardly free to write its own law of consumer protection and antitrust since the statutory standard which the rules may define with greater particularity is a legal standard. Although the Commission's conclusions as to the standard's reach are ordinarily shown deference, *see FTC* v. *Motion Picture Advertising Service Co., supra*, 344 U.S. at 396; *FTC* v. *Cement Institute, supra*, 333 U.S. at 720-721; *FTC* v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 314 (1934), the

standard must "get [its] final meaning from judicial construction." *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965). *See also FTC* v. *Cement Institute, supra*, 333 U.S. at 709; *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357, 368 (1965).

As we suggested earlier, our task in determining the meaning of this legislation is the usual one of "starting from the areas where the legislative intent is readily discernible, and projecting to fair and reasonable corollaries of that intent for the specific issue before us." *Montana Power Co.* v. *FPC*, 144 U.S.App.D.C. 263, 270, 445 F.2d 739, 746 (1970) (*en banc*), *cert. denied*, 400 U.S. 1013 (1971). Under this approach, we start here with the language of Section 6(g). It is as clear as it is unlimited: "The Commission shall also have power * * * to make rules and regulations for the purpose of carrying out the provisions of [Section 5]." Ambiguous legislative history cannot change the express legislative intent. The Commission is using rule-making to carry out what the Congress agreed was among its central purposes: expedited administrative enforcement of the national policy against monopolies and unfair business practices. Under the circumstances, since Section 6(g) plainly authorizes rule-making and nothing in the statute or in its legislative history precludes its use for this purpose, the action of the Commission must be upheld.

VI

Our conclusion as to the scope of Section 6(g) is not disturbed by the fact that the agency itself did not assert the power to promulgate substantive rules until 1962 [26] and indeed indicated intermittently before that time that it lacked such power.[27] As the Supreme Court put it in

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[26] *See* note 29 *infra*.

[27] *See* 1922 FTC ANNUAL REPORT 36; Hearings on H.R. 2321 Before the House Committee on Interstate & Foreign Commerce,

United States v. *Morton Salt Co., supra,* a case which involved what was thought to be a novel assertion of the FTC's statutory authority:

82d Cong., 1st Sess., 160 (1951) (statement of Mr. Henry Miller, Assistant General Counsel, FTC); Kintner, *The Current Ordeal of the Administrative Process: In Reply to Mr. Hector,* 69 YALE L. J. 965, 970-971 (1960) (the author was the current chairman of the FTC). *See generally* 117 CONG. REC. S17877-17879 (daily ed. Nov. 8, 1971). During its early years, the Commission relied heavily on trade practice conferences in which members of certain industries would convene and agree on guidelines defining fair trade practices and would attempt to comply with them. But these agreements had merely advisory status for purposes of determining what practices the agency would move against. FTC, TRADE PRACTICE SUBMITTALS 22 (1925). One attempt was made, by Sen. Nye of S. Dak., to give these rules the force of law, as substantive rules are said to have today, *see* S. 2628, 72d Cong., 1st Sess. (1932), 75 CONG. REC. (Part 2) 1287 (1932), but no action was taken in Congress on his bill. In some cases, moreover, the Supreme Court has referred to the Commission's method of elaborating the statutory standard as a " 'gradual process of judicial inclusion and exclusion,' " *see FTC* v. *Raladam Co.,* 283 U.S. 643, 648 (1931), *quoting Davidson* v. *New Orleans,* 96 U.S. (6 Otto) 97, 104 (1878). *See also Pan American World Airways* v. *United States,* 371 U.S. 296, 307-308 (1963); *Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 533 (1935); *FTC* v. *Gratz,* 253 U.S. 421, 435-437 (1920). But these isolated quotes are hardly determinative, since the Court has never faced the precise question of whether the Commission was delegatd substantive rulemaking power by Congress and the various comments can be best understood as descriptive of the Commission's then existent mode of operation rather than as prescriptive of the lawful bounds of the agency's powers. To give weight to these quotes would force us to weigh them against the unelaborated assertion by Mr. Justice Goldberg in his dissenting opinion in *Atlantic Refining Co.* v. *FTC,* 381 U.S. 357, 390-391 (1965), that "[t]he Commission has the general power to choose to proceed in this field, as in others, through either rule-making or the process of case-by-case adjudication. * * * Whichever method the Commission chooses to use, however, it seems obvious to me that the Commission must formulate a clear rational rule which is based on an adequate economic explication and takes into consideration the situation of all industry members affected by the rule." In our view, to repeat, it seems safe to conclude that no decision of the Supreme Court concerning the agency foreshadows today's result either way.

> "The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed to lie dormant, any more than nonexistent powers can be prescripted by an unchallenged exercise. We know that unquestioned powers are sometimes unexercised from lack of funds, motives of expediency, or the competition of more immediately important concerns. We find no basis for holding that any power ever granted to the Trade Commission has been forfeited by nonuser [*sic*]."

338 U.S. at 647-648. *See also FTC* v. *Dean Foods Co.*, *supra*, 384 U.S. at 610; *United States* v. *duPont & Co.*, 353 U.S. 586, 590 (1957). The various statements made by Commission representatives questioning its authority to promulgate rules which are to be used with binding effect on subsequent adjudications are not determinative of the question before us. True, the accustomed judicial practice is to give "great weight" to an agency's construction of its own enabling legislation, particularly when such a construction stretches back, as here, to a time close to the agency's origin.[28] *See Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *United States* v. *American Trucking Assns*, 310 U.S. 534, 549 (1940); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933). The argument for judicial deference is not so strong where, as here, the question does not require special agency competence or expertise, requiring the agency, for example, to make a complex judgment involving its areas of expertise, competition and impact of business practices on consumer behavior. Here, the question is simply one of statutory interpretation concerning the procedures and setting in which the Commission may elaborate its statutory standard. Since this sort of question calls largely for the exercise of historical analysis and logical and

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[28] *See* 1922 FTC ANNUAL REPORT, *supra* note 27, at 36.

analogical reasoning, it is the everyday staple of judges as well as agencies. Thus we feel confident in making our own judgment as to the proper construction of Section 6(g). *See Wilderness Society* v. *Morton*, —— U.S. App.D.C. ——, ——, —— F.2d ——, —— (Nos. 72-1796, 72-1797 & 72-1798, decided February 9, 1973) (*en banc*) (slip opinion at 43), *cert. denied*, —— U.S. ——, 41 U.S. L. WEEK 3527 (April 2, 1973); *Thompson* v. *Clifford*, 132 U.S.App.D.C. 351, 364, 408 F.2d 154, 167 (1968). We are, of course, reassured by the fact that the Commission itself, as distinguished from its former spokesmen, has come to the same conclusion.

Our refusal to abdicate our "ultimate responsibility to construe the language employed by Congress," *Zuber* v. *Allen*, 396 U.S. 168, 193 (1969), is further supported by the fact that the Commission's present claim of substantive rule-making authority is not new, but of several years' standing,[29] and, more important, by our belief that rejecting the claim of rule-making power would run counter to the broad policies of expeditious enforcement and greater certainty in the administration of the statute that clearly motivated Congress in 1914. *Cf. ibid.* So far as

[29] The Commission first announced it would enforce the prohibitions of § 5 with the assistance of substantive rules in 1962 when it amended its Rules of Practice to provide for issuance of Trade Regulation Rules, 27 FED. REG. 4636, 4796 (1962). But the actual effect of these rules and the Commission's view of whether they were merely to be viewed as interpretive or statutorily based and thus determinative of the questions to be litigated in § 5 proceedings remained unclear. *See* Statement of Basis and Purpose of Trade Regulation Rule [Cigarette Advertising], 29 FED. REG. 8325, 8369 n. 143 (1964). The chairman of the FTC, Mr. Paul Rand Dixon, indicated after 1962 that the kind of binding rule-making authority the FTC asserts here did not exist. *See, e.g.*, Hearings on H.R. 15440 Before House Interstate & Foreign Commerce Committee, 89th Cong., 2d Sess., 990 (1966); Hearings on S. 387 Before Senate Subcommittee on Antitrust & Monopoly of the Committee on the Judiciary, 88th Cong., 1st Sess., 281-282 (1963). *See generally* Case Note, *supra* note 23, 14 B.C. IND. & COMM. L. REV. at 376-382.

we can tell, the earlier assertions of lack of rule-making power were based on an unduly crabbed and cautious analysis of the legislative background, an analysis that we have conducted independently and that has brought us to an opposite but, in our judgment, correct conclusion.

A more troubling obstacle to the Commission's position here is the argument that Congress was made fully aware of the formerly restrictive view of the Commission's power and passed a series of laws granting limited substantive rule-making authority to the Commission in discrete areas allegedly on the premise that the 1914 debate withheld such authority. Where there has been evidence of congressional knowledge of and acquiescence in a long-standing agency construction of its own powers, courts have occasionally concluded that the agency construction had received a *de facto* ratification by Congress. *See Power Reactor Development Co.* v. *Int. Union of Elec., Radio & Machine Wkrs*, 367 U.S. 396, 409 (1961); *cf. Boesche* v. *Udall*, 373 U.S. 472, 482-483 (1963).

But *de facto* ratification through acquiescence in an administrative construction is not lightly attributed. *See Zuber* v. *Allen*, *supra*, 396 U.S. at 193; *Power Reactor Development Co.* v. *Int. Union of Elec., Radio & Machine Wkrs*, *supra*; *Ex parte Endo*, 323 U.S. 283, 303 n. 24 (1944). The argument before us is not that Congress, by a combination of its knowledge of the agency construction and its inaction, as in *Power Reactor*, could be said to have accepted the construction. Even in these cases it can be argued quite plausibly that imputing ratification in this fashion fails to take into account significant practical aspects of the legislative process: those legislators actually aware of the construction in question may not have been so concerned as to raise it to the attention of most members,[30] and even in the event

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[30] *See Zuber* v. *Allen*, 396 U.S. 168, 193 (1969); *Thompson* v. *Clifford*, 132 U.S. App.D.C. 351, 361, 408 F.2d 154, 164 (1968).

some legislators were deeply troubled by the construction, the press of other business was such as to keep the question on the "back burner."[31] Here the situation is different. The view that the Commission lacked substantive rule-making power has been clearly brought to the attention of Congress[32] and, rather than simply failing to act on the question, Congress, in expanding the agency's powers in several discrete areas of marketing regulation, affirmatively enacted limited grants of substantive rule-making authority in the Wool Products Act of 1939,[33] the Fur Products Labeling Act of 1951,[34] the Flammable Fabrics Act of 1953 as amended in 1967,[35] the Textile Fiber Products Identification Act of 1958,[36] and the Fair

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[31] *See* Jaffe, *An Essay on Delegation of Legislative Power: I*, 47 COLUM. L. REV. 359, 366 (1947).

[32] *See, e.g.*, Hearings on H.R. 2321, *supra* note 27, at 160-161; Hearings on H.R. 15440, *supra* note 29, at 990. *See also* H.R. Rep. No. 986, 85th Cong., 1st Sess., 2 & n. 1 (1957) (discussing the predecessor of the Textile Fiber Products Identification Act of 1958).

[33] *See* 15 U.S.C. § 68a (1970). The FTC, in furtherance of its power to enforce § 2 of the Clayton Act, as amended by the Robinson-Patman Act of 1936, 15 U.S.C. § 13 (1970), is also empowered "after due investigation and hearing to all interested parties, [to] fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established * * *." 15 U.S.C. § 13(a). And it is argued that the existence of this narrow provision should be taken, by implication, to exclude any broader Commission rule-making authority, especially in the pricing field. F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 123-124 (1964 Supp.). But, as we suggested in text, *see* pp. 6-7 *supra*, this sort of logic, resting on the maxim *expressio unius est exclusio alterius*, is unreliable.

[34] *See* 15 U.S.C. §§ 69a(a)-(c), 69f(b) (1970).

[35] 81 STAT. 571 (1967), 15 U.S.C. § 1194(c) (1970).

[36] 15 U.S.C. § 70a(a), (b), (c) (1970).

Packaging and Labeling Act of 1967.[37] Thus it is argued that Congress would not have granted the agency such powers unless it had felt that otherwise the agency lacked rule-making authority.

Conceding the greater force of this argument than one premised on congressional inaction, we believe it must not be accepted blindly. In such circumstances, it is equally possible that Congress granted the power out of uncertainty, understandable caution, and a desire to avoid litigation. While this argument, like any theory requiring us to draw inferences from congressional action or inaction, may be speculative, we believe it cannot be ignored here. For there is ample evidence that, while some of the limited rule-making legislation may well have been influenced by the belief that the 1914 Act did not grant the Commission substantive rule-making power,[38] at least during the passage of the Packaging and Labeling Act of 1967, this assumption was not accepted and was thought by many congressmen to be an open question, despite the protestations of the Commission's chairman that the agency was powerless under the 1914 Act.[39] The report of the House Committee on Interstate and Foreign Commerce, while pointing out that the agency lacked "*specific*

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[37] 15 U.S.C. § 1456(b) (1970).

[38] *See, e.g.*, 86 CONG. REC. (Part 10) 11320 (1940), where Congressman Case, in discussing the Wool Products Labeling Act's provision for rule-making and the opposition to granting such power to the agency, said:

> "The second argument * * * is that the evils of false labeling are being curbed and gradually cured by the Federal Trade Commission. If that were so the Federal Trade Commission itself would not be on record in favor of the passage of the bill and the Federal Trade Commission did testify in favor of the bill. It testified that something like this was needed to put teeth into their recommendations to the trade."

[39] *See* Hearings on H.R. 15440, *supra* note 29, at 990 (statement of Chairman Dixon).

authority" (emphasis added) to issue regulations prescribing standards for package labeling, suggested that the question of the agency's general authority under Section 6(g) to do so was open. The report noted that the "authority of the Commission to issue trade regulation rules * * * has never been passed on in the courts." H.R. Rep. No. 2076, 89th Cong., 2d Sess., 22 (1966). The Senate Committee report did not touch on the issue directly, instead focusing on the question whether stronger procedural safeguards than were guaranteed by the Administrative Procedure Act should be enacted in the standards-setting section. S. Rep. No. 1186, 89th Cong., 2d Sess., 17 (1966). But the dissenting members argued that the bill's provision of rule-making authority was redundant and that the rule-making provision merely served to "make the [Commission's] authority apparent." *Id.* at 40. As we suggested earlier, imputing congressional ratification to a disputed administrative construction of its powers is, in the words of the Supreme Court, "shaky business," *Power Reactor Development Co.* v. *Int. Union of Elec., Radio & Machine Wkrs, supra*, 367 U.S. at 409. Where there is solid reason, as there plainly is here, to believe that Congress, in fact, has not wholeheartedly accepted the agency's viewpoint and instead enacted legislation out of caution and to eliminate the kind of disputes that invariably attend statutory ambiguity, we believe that relying on the *de facto* ratification argument is unwise. In such circumstances, we must perform our customary task of coming to an independent judgment as to the statute's meaning, confident that if Congress believes that its creature, the Commission, thus exercises too much power, it will repeal the grant.[40]

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[40] We are aware, of course, that in both the just concluded 92nd Congress and the current 93rd Congress legislation granting the FTC limited substantive rule-making power in the area of "unfair and deceptive practices" has been under consideration. One such bill, S. 986, 92d Cong., 1st Sess. (1971), was passed by the Senate,

VII

In sum, we must respectfully register our disagreement with the District Court's painstaking opinion. Its result

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117 CONG. REC. S17887 (daily ed. Nov. 8, 1971), but did not come to a vote in the House. It is also true that in the Senate debate on S. 986 comments were made by various Senators to the effect that the Commission currently lacked the power to issue rules defining either unfair methods of competition or unfair or deceptive acts or practices, which rules would be enforceable in cease and desist proceedings. *See id.* at 17843-17848 (statement of Sen. Hruska); *id.* at 17849 (statement of Sen. Cook); *id.* at 17873 (statement of Sen. Cotton), but no such statement was made by the bill's sponsor, Sen. Magnuson, who pointed out, "For years the argument has been going on about the Federal Trade Commission not having the authority it should have. We tried to fashion a bill. I, myself, had some doubts about the rulemaking authority, but I think the bill covers it very well." *Id.* at 17858. The bill that passed the Senate not only gave the FTC power "to issue legislative rules defining with specificity acts or practices which are unfair or deceptive to consumers and which section 5(a)(1) of this Act proscribes," S. 986, *supra*, § 206, but it also provided that procedures available in adjudication under the Administrative Procedure Act, 5 U.S.C. §§ 556, 557 (1970), should be employed and judicial review should employ the substantial evidence rule. *Ibid.* Moreover, such rules would only become effective in the event neither the House of Representatives nor the Senate disapproved them within 60 calendar days while in session. *Ibid.* If this legislation had actually been enacted, of course, the Commission would not have *all* the power it assumes today, since the proposed rule-making section in S. 986 repealed § 6(g), as passed in 1914, and substituted a provision allowing only rules and regulations "as are specifically provided for hereinafter," thus nullifying any argument that rules might be promulgated to define "unfair methods of competition." On the other hand, but for the statements on the Senate floor quoted above, it is possible to interpret S. 986 as an indication of senatorial intent to narrow what the legislators felt was presently an overbroad rule-making power under the current statute. In any event, the legislation did not pass, and we take its reintroduction in the current session in substantially similar form, S. 356, 93d Cong., 1st Sess. (1973), as an indication that the questions of FTC rule-making power, its scope, and the safeguards surrounding the promulgation of such rules, are under close study and nothing more. In the event Congress decides that the scope of rule-making power that we find to be implied in the 1914 Act is too broad or lacks sufficient safeguards, surely it appears in a prime position to make the required changes.

would render the Commission ineffective to do the job assigned it by Congress. Such a result is not required by the legislative history of the Act. We rely, therefore, on the plain language of Section 6(g) which gives the Commission the authority to "make rules and regulations for the purpose of carrying out the provisions of [Section 5]." *See Mourning* v. *Family Publications Service, Inc., supra.* We hold that under the terms of its governing statute, 15 U.S.C. § 41 *et seq.*, and under Section 6(g), 15 U.S.C. § 46(g), in particular, the Federal Trade Commission is authorized to promulgate rules defining the meaning of the statutory standards of the illegality the Commission is empowered to prevent. Thus we must reverse the District Court's judgment and remand this case for further proceedings.

It is so ordered.

APPENDIX

THE 1914 CONGRESSIONAL DEBATES INVOLVING TRADE COMMISSION RULE-MAKING POWER

The result we reach in this case might be different if we were convinced that the legislators who worked out the details of the Federal Trade Commission Act had carefully focused on the implications of rule-making power and given a clear indication that they rejected its use except for purely procedural purposes. We have examined the legislative history—the debates and reports—with considerable care and have analyzed appellees' arguments based on that history. We find that on the question of rule-making the leading proponents of the legislation in both Houses spoke ambiguously. The scope of the Commission's power to make rules was not a central issue in the lengthy debate, and the occasional comments to which we are referred by appellees as demonstrating a firm contrary intent on the part of those most familiar with the details of the legislation turn out, on close inspection, to be most sensibly interpreted in ways other than those urged on us.

I. *Consideration in the House of President Wilson's 1914 Proposal.*

Two days after President Wilson's 1914 message to Congress, the Administration's plan for a trade commission was introduced in both Houses of Congress. Sponsored by Congressman Clayton of Alabama and Senator Newlands, the bill [1] essentially provided for an investigatory commission, clothed with power to compel reports on corporations and business and financial practices and to recommend prosecution under the antitrust laws. The

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[1] H.R. 12120, S. 4160, 63d Cong., 2d Sess. (1914). *See* 51 CONG. REC. (Part 3) 2142-2144 (1914).

proposed agency lacked any independent power to order a halt to business practices involving a violation of law. The agency did have the power, upon the initiative of the Attorney General, to assist him in framing antitrust settlements and, upon the request of federal judges trying antitrust cases, to make findings involving questions in pending litigation as well as to assist in framing decrees. The Clayton-Newlands bill was modified somewhat in the House Committee on Interstate and Foreign Commerce. The bill reported out, drafted by Congressman Covington,[2] deleted the authority contained in the original proposal to allow the commission to recommend antitrust prosecutions, but otherwise was closely similar to the bill originally proposed. The Committee majority explicitly rejected "the establishment of a commission having powers of regulation or control of prices, or the power directly to issue orders controlling the lawful operations of industrial business in this country."[3]

The Covington bill did, however, include a section granting the commission authority to "make rules and regulations and classifications of corporations" in order to carry out the bill's other provisions, but it was agreed that this merely gave the commission power to elaborate in detail which businesses would be subject to its reporting requirements. *See* 51 CONG. REC. (Part 9) 8842-8844 (1914) (statement of Congressman Covington); *id.* at 9047-9048 (statement of Congressman Towner of Iowa).[4]

Little that occurred in the House debate up to the passage on June 5 of the Covington bill, still formally backed by the President, bears directly on the issue before us. The proposed commission was given no power to approve

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[2] H.R. 15613, 63d Cong., 2d Sess. (1914), reported out at 51 CONG. REC. (Part 9) 8840 (1914).

[3] H.R. Rep. No. 533, 63d Cong., 2d Sess., 2 (1914).

[4] *See also* H.R. Rep. No. 533, *supra* note 3, at 3-4.

or disapprove particular business practices according to a legal standard, and thus the question of utilizing substantive rule-making in aid of adjudication was submerged under the broader question whether the commission should have any independent enforcement authority at all.

This is not to say that the House wholly ignored the question of independent enforcement authority for the commission. Five Republican members of the Committee, while accepting the Covington bill, noted pointedly that it did not follow the approach of the 1912 GOP platform, which had proposed having the commission assume some of the antitrust functions currently exercised by the courts, an undoubted reference to plans that the agency should have power to bring cases, hear evidence, make findings, and promulgate orders enforceable in federal courts. Representative Stevens of New Hampshire dissented from the majority on the Committee and berated the Covington bill for failing to give the commission "general power to prevent unfair competitive practices" in order to correct what he saw as the "disappointing" results of relying wholly on Justice Department prosecutions in the federal courts, which he characterized as a "slow, costly process." [5] Stevens' own proposal to give the commission independent adjudicatory power, H.R. 15660, 63d Cong., 2d Sess. (1914), did not appear to contemplate use of substantive rules promulgated separately from the hearings he proposed to order corporations to halt practices constituting "unfair or oppressive competition." Instead, he viewed "unfair or oppressive competition" as a "question of fact to be decided by the commission the same way [on a case-by-case basis] that the Interstate Commerce Commission decides what rates and practices of the railroads are unreasonable and un-

[5] *Id.*, Part 2, at 1.

fair."[6] When Stevens attempted to bring his bill to the floor, he was ruled out of order. 51 CONG. REC. (Part 9) at 9062. An even stronger amendment introduced by Representative Murdock of Kansas not only gave the commission power to halt "unfair or oppressive competition," but also provided a list of practices defining the term and authorized the commission, in some circumstances, to assume price-fixing power to halt monopoly. *Id.* at 9050-9051. This proposal, too, was rejected. *Id.* at 9055.

The question whether the commission should have power to define rules of business conduct through nonadjudicatory proceedings also surfaced, but proposals to give the commission such power were rejected.[7] The debate on

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[6] *Id.* at 2.

[7] Congressman Morgan of Okla. proposed to amend the Covington bill to give the commission power to declare rules to prevent corporations subject to the commission's jurisdiction "from engaging in any practice or from using any method or system, or from pursuing any policy or from resorting to any device, scheme, or contrivance that constitutes unfair competition or unjust discrimination as between competitors, individuals, or communities." 51 CONG. REC. (Part 9) at 9047. This amendment was quickly rejected. *Id.* at 9050. A similar proposal was made by Cong. Dillon of S. Dak., *id.* at 9056, but his plan would have specifically granted the commission adjudicatory power too. *Ibid.* It was rejected. *Id.* at 9057. This proposal, in turn, was similar to one made by Cong. Lafferty of Ore. in a report dissenting from the Commerce Committee's recommendation of the Covington bill. Lafferty's plan would have granted the commission adjudicatory *and* substantive rule-making authority to prevent "unfair or oppressive competition or unfair trade practices," and authority once a violation had been found, not only to issue a restraining order, but also, in the event of a finding of "substantial monopoly" and "exhorbitant prices," a limited price-fixing remedial power, as well as power to eliminate "substantial monopoly" by an "order * * * specifying such changes in the organization, conduct, or management of its property * * * as * * * will most effectively and promptly terminate such monopolistic power, while at the same time safeguarding property rights and business efficiency." H.R. Rep. No. 533, *supra* note 3, Part 3, 19-26. The final amendment to add significant powers to the Covington bill's com-

such plans was perfunctory, probably because it was clear that the majority of the House supported the concept of a weak commission without any enforcement or independent rule-making authority. At this early stage in the deliberations, it seemed to make little difference to the majority behind the Covington bill that some opponents, like Stevens, backed a commission with purely adjudicatory powers and others, principally Progressives like Murdock and Lafferty, preferred an agency relying on a combination of adjudication and substantive rule-making. Thus, while we occasionally give weight to positive rejections of amendments by Congress, *see, e.g.*, *National Automatic Laundry & Cleaning Council* v. *Shultz*, 143 U.S.App.D.C. 274, 291, 443 F.2d 689, 706 (1971), we believe we are justified here in concluding that the rejection of rule-making proposals did not necessarily represent a rejection of rule-making as a distinctive technique of agency regulation, but could just as easily, if not more persuasively, be interpreted as a broader rejection of a commission with any independent enforcement power. *Cf. United States* v. *Wise*, 370 U.S. 405, 411 (1962).

For our purposes, it is enough to note that opponents of the President's initial plan who argued for a stronger commission agreed broadly that continued reliance on the courts for adjudication of cases involving anticompetitive practices was an inadequate solution. Representative Dillon of South Dakota, for example, proposed that a commission have power to make rules regulating "future conduct" and enforcement power to issue orders against breaches of such rules as well as breaches of a broad standard of "any misconduct, unfair methods, unfair competition, acts of oppression, or acts of deception." 51 CONG. REC. (Part 9) at 9056. His proposal would seem on

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mission was made, again, by Cong. Morgan. It provided for adjudicatory and price-fixing powers, 51 CONG. REC. (Part 9) at 9066, and was quickly rejected, *id.* at 9067.

its face to contemplate a commission utilizing rule-making to specify standards of improper conduct under a broad standard and then adjudication as a mode of enforcing such standards in cases where they applied. He went so far as to reject almost all further judicial participation in the task of restoring free competition, arguing in accustomed terms:

> "The attempt to control the corporations through the judiciary will fail. The judiciary with its delays, its technicalities, and uncertainties is wholly inadequate to regulate or control the trusts and combinations. The legislative department of government does not need the aid of the courts in regulating legislative or administrative matters. * * *"

Ibid.

II. *Consideration in the Senate of President Wilson's Revised Proposal.*

After the Covington bill passed the House, it went to the Senate Committee on Interstate Commerce whose chairman, Senator Newlands, had been an original sponsor of the President's trade commission plan. Within a few days of the House vote, however, the President radically altered his view as to the proper extent of the commission's powers. No longer did he support the Covington bill's conception of a commission without independent enforcement power. In a turnabout, he now backed legislation giving the agency power to order a halt to unfair competition practices after holding a hearing and making findings.[8] Historians[9] are broadly agreed on the

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[8] Wilson's change of mind is discussed in A. LINK, WILSON: THE NEW FREEDOM 434-438 (paper ed. 1965); R. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 186-187 (1941); G. HENDERSON, THE FEDERAL TRADE COMMISSIONS A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE 26-27 (1924).

[9] *See* note 8 *supra.*

rationale for the President's switch of position. As part of his package of economic reform legislation, which included the plan for a weak trade commission, the President was supporting legislation to make more specific the antitrust laws' prohibitions. This latter bill was introduced by Congressman Clayton of Alabama and ultimately became the Clayton Act.[10] In its original form, the Clayton bill laid out a series of new prohibitions on anticompetitive behavior, provided for Justice Department enforcement of the new rules, and provided criminal penalties for violations.[11] This bill passed the House on June 5, the same day as the Covington bill providing for a new trade commission.[12] But the Clayton bill received widespread criticism, not only from businessmen and their legislative backers who resented the provisions for criminal penalties, but also from those supporting tightening of the rules of antitrust. The reformers' argument was that the task of defining in statutory terms all possible restraints of trade injurious to competition was essentially Sisyphean, that businessmen were sufficiently clever to invent new forms of trade restraint that would

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[10] Act of Oct. 15, 1914, c. 323, 38 STAT. 730 *et seq.*, as amended, 15 U.S.C. §§ 12-27 (1970). As finally enacted, a few weeks after the Trade Commission Act was passed, the Clayton Act gave the FTC the power to enforce its substantive provisions aimed at price discrimination, § 2, as amended, 15 U.S.C. § 13, exclusive dealing and tying arrangements, § 3, 15 U.S.C. § 14, anticompetitive mergers, § 7, as amended, 15 U.S.C. § 18, and interlocking directorates, § 8, as amended, 15 U.S.C. § 19. The FTC's enforcement of these provisions would occur in adjudicatory proceedings reviewable in the Courts of Appeals, similar to the proceedings carried on under § 5 of the Trade Commission Act. *See* § 21 of the Clayton Act, as amended, 15 U.S.C. § 21.

[11] H.R. 15657, 63d Cong., 2d Sess. (1914).

[12] *See* 51 CONG. REC. (Part 10) 9910-9911 (1914).

escape the coverage of the Clayton bill's provisions.[15] The President was apparently receptive to this criticism of the Clayton bill. Moreover, he was also apparently receptive to criticism of the traditional practice of relying

[15] *See* sources cited in note 8 *supra*. The Senate Committee on Interstate Commerce report endorsing the new version of the commission bill made this point explicitly:

> "One of the most important provisions of the bill is that which declares unfair competition in commerce to be unlawful, and empowers the commission to prevent corporations from using unfair methods of competition in commerce by orders issued after hearing, restraining, and prohibiting unfair methods of competition, which orders are enforceable in the courts.
>
> "The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.
>
> "It may be stated that representatives of the National Implement and Vehicle Manufacturers' Association, the Ohio Manufacturers' Association, and the Illinois Manufacturers' Association approved the passage of a trade commission bill and a provision regarding the inquiry into and condemnation of unfair practices in trade.
>
> "It is believed that the term 'unfair competition' has a legal significance which can be enforced by the commission and the courts, and that it is no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination. The committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices, such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition."

S. Rep. No. 597, 63d Cong., 2d Sess., 13 (1914). *See also* 51 CONG. REC. (Part 11) 11084 (1914) (statement of Senator Newlands, chairman of the Commerce Committee).

exclusively on the Justice Department and the courts for antitrust enforcement. Thus he dealt with these two types of criticism by radically changing and expanding the role he had originally planned for the commission. Now it would be given independent authority to enforce through adjudicatory proceedings a broad standard of illegality that, unlike the specific terms of the Clayton bill, could be adapted to the variety of business practices with anticompetitive effects.[14]

The leadership of the Senate Commerce Committee was informed of the President's change of heart and promptly pushed through the Committee onto the floor legislation embodying the new plan. But the bill reported out clearly did not embrace the exercise of substantive rule-making power. The bill that passed the House had a separate section giving the commission power to make rules and regulations to define the scope of its investigatory authority.[15] But the new bill reported out of the Commerce Committee by Senator Newlands which gave the commission, at the behest of the President, new enforcement authority contained no grant of any rule-making power.[16] What the

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[14] *See* A. LINK, *op. cit. supra* note 8, at 435-439.

[15] *See* H.R. 15613, *supra* note 2, § 8. The House-passed bill is printed at H.R. Rep. No. 1142, 63d Cong., 2d Sess., 10-13 (1914).

[16] There may be reason to believe that this deletion of rule-making authority in the Senate bill was merely a linguistic alteration of the Covington bill. The Covington bill's rule-making power was meant to permit the commission to designate which corporations with gross receipts of less than $5 million would be required to file annual reports. 51 CONG. REC. (Part 9) at 8845-8846. There was some dispute over whether this power extended to allow the commission to impose on corporations subject to its reporting requirements a uniform system of accounting and an amendment was offered by Cong. Towner of Iowa to grant the commission this power explicitly, *id.* at 9047, but it was quickly rejected, *id.* at 9049. The bill that emerged from the Senate Commerce Committee, *see* S. 4160, § 3(c), printed at S. Rep. No. 597, *supra* note 13, at 1-5, appeared to give the commission discretionary power, without terming this power rule-making authority, to require corporate reports from

Committee apparently had in mind was a *quasi*-judicial agency, elaborating the Committee bill's statutory standard of illegality—"unfair competition"—on a purely case-by-case basis. This view of the bill that emerged on the Senate floor after the Administration decided to support a commission with expanded power is amply supported by statements by the bill's proponents on the Senate floor, *see* 51 CONG. REC. (Part 11) 11178 (1914) (statement of Senator Hollis); 51 CONG. REC. (Part 13) 12916-12917 (1914) (statement of Senator Cummins); 51 CONG. REC. (Part 13) at 13317 (statement of Senator Walsh), as well as statements by critics of the bill, *see* 51 CONG. REC. (Part 11) at 11181 (statement of Senator Thomas). *See also* S. Rep. No. 597, 63d Cong., 2d Sess., 13 (1914).

In other words, we believe the Commission's position can draw no support from the Senate's deliberations over the bill granting the Commission enforcement power that emerged from the Senate Commerce Committee following President Wilson's change of heart. The bill that emerged from the Committee contained no provision even remotely supporting the exercise of commission rule-making power to define the statutory standard of illegality contained in the section of the bill granting the agency adjudicatory authority. Moreover, during the debate over the Commerce Committee's bill Senator Newlands, Committee chairman and the bill's floor manager, argued that the legislation before the Senate encompassed "no powers except those conferred by this bill," 51 CONG. REC. (Part 12) at 11602, further supporting our view of this as-

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any firm as well as the power to require a uniform system of annual reports, which might be viewed as tantamount to a uniform accounting requirement. And this provision was unchanged in the bill that passed the Senate. *See* H.R. Rep. No. 1142, *supra* note 15, at 15. Thus it would seem that the discretion given the commission in the House bill in the exercise of its power to compel corporate reporting remained in the Senate bill, but was simply phrased differently and no longer termed the power to "make rules and regulations and classifications of corporations."

pect of the deliberations. To be sure, the bill that emerged from the Senate Commerce Committee was amended in a few respects on the Senate floor prior to passage and submission to a House-Senate conference committee. But none of these amendments can be read as supporting rule-making power.[17]

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[17] The Senate did accept an important substitute proposed by Senator Cummins, 51 CONG. REC. (Part 13) at 13109, for the version of § 5 reported out of the Senate Committee on Interstate Commerce. This substitute, printed at 51 CONG. REC. (Part 13) at 13045, gave defendants found liable in commission proceedings the explicit right to bring suit in the District Courts for review of the commission's orders. No such provision was contained in the bill reported by the Senate Committee. *See* S. 4160, 63d Cong., 2d Sess., § 5 (1914), printed in S. Rep. No. 597, 63d Cong., 2d Sess., 3-4 (1914). Moreover, the Cummins substitute also made clear that the District Courts would apply the same standard of review to commission orders as were applied to orders of the Interstate Commerce Commission, at least in cases of review sought by defendants before the agency. The bill reported from the Commerce Committee did not make clear what standard of review the courts would apply to the commission's orders. It merely stated: "Whenever the commission, after the issuance of such order, shall find that such corporation has not complied therewith, the commission may petition the district court of the United States, within any district where the method in question was used or where such corporation is located or carries on business, praying the court to issue an injunction to enforce such order of the commission; and the court is hereby authorized to issue such injunction." *See* S. Rep. No. 597, *supra* at 4. Because this provision suggested no actual standard of review, it was criticized by Senator Cummins on the ground that it might be construed so as to preclude any review of the commission's actions and to require the courts to issue rubber-stamp injunctions. As such, it was felt, the bill might be held unconstitutional for want of due process. *See* 51 CONG. REC. (Part 13) at 13007; *id.* at 13049-13050. *See also id.* at 13053 (statement of Senator Walsh). Cummins' substitute also made a slight linguistic change in the first few sentences of § 5, sentences enunciating the commission's enforcement power. The Committee's bill said:

> "Sec. 5. That unfair competition in commerce is hereby declared unlawful.
>
> "The commission is hereby empowered and directed to prevent corporations from using unfair methods of competition in commerce."

III. *The Conference Committee Deliberations and Final Floor Debates.*

Because the Senate bill lacked any rule-making provision and the House bill did not give the commission power to enforce a statutory standard of legality, the most important aspect of the legislative debate for our purposes occurred after the conference committee met and composed the differences between the two bills. It was only at this point that a rule-making provision was inserted which might justify the promulgation of rules defining the kinds of practices that breached the bill's standard of illegality. As we have pointed out, the House bill included a rule-making provision, but granted the commission no power to enforce a standard of legality. The Senate bill, by contrast, had no rule-making provision, but did include a standard of legality to be enforced by

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S. Rep. No. 597, *supra* note 13, at 3. The remainder of the section detailed the procedures by which the commission would act to prevent unfair competition and provided for judicial enforcement, as discussed above. In addition to altering the judicial review procedures, the first two sentences in his substitute revised the Committee's version slightly to read:

> "Sec. 5. That unfair competition in commerce is hereby declared unlawful.
>
> "The commission shall have authority to prevent such unfair competition in commerce *in the manner following, to wit:* * * *"

51 CONG. REC. (Part 13) at 13045. (Emphasis added.) It is tempting, of course, to conclude that the addition of the italicized language in the substitute demonstrates a senatorial purpose to make clear, by the use of arguably limiting language, that only through adjudication would the standard of illegality be clarified to cover specific business practices. But this language was not discussed on the floor and it really adds nothing to our pre-existent view of the Senate deliberations on the bill that emerged from the Commerce Committee, since no provision granting rule-making power was inserted to start with. Of course, had this language stayed in the legislation as it was ultimately passed by both Houses and signed by the President, we would have to deal with its implications. But it was removed in the conference committee, again without any discussion.

the commission. The conference bill put both types of provisions together in a single bill. We believe the rule-making provision, Section 6(g), justifies promulgation of standards defining with specificity the meaning of the statutory standard of legality in Section 5, a standard enforceable in subsequent agency adjudications.

Appellees insist that, since neither bill prior to conference granted the commission power to issue rules defining the statutory standard of illegality, the conference committee was barred by rules of congressional procedure from inserting this supplemental power. The leader of the House conferees, Congressman Covington, told the House that the bill produced by the conference was "within the limits of conference." 51 CONG. REC. (Part 15) 14925 (1914). Senator Newlands, his Senate counterpart, pointed out, likewise, that the conference product was "entirely within the range of difference between the Senate and the House." *Id.* at 14769. Thus we have the leaders of the House and Senate conferees assuring the Congress that the conference bill complied with conference limitations and the Congress accepting that assurance. More important, the assurance given the Congress by Covington and Newlands appears well founded. The original House bill contained a rule-making provision granting authority roughly commensurate with the powers of investigation the committee was then designed to have. While the Senate bill deleted any such authority, we believe it can be persuasively argued that by reinserting a rule-making provision into the stronger commission bill all the conference did was reinstate the principle of the House bill as to rule-making—that is, permitting the commission to exercise authority roughly commensurate with its other powers, great or small. In this sense, the insertion of Section 6(g), as interpreted here, does no violence to the principle limiting the authority of the conference. Moreover, while this general principle of germaneness as to the powers of a conference

may bind Congress, it has never bound the courts, which have frequently faced the problem of interpreting legislation in light of conference changes. *Cf. St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 221-222 (1961).

Unfortunately, the crucial debates and reports on the bill produced by the conference, passed by both Houses, signed into law by the President, and continuing as the agency's basic organic statute today do not illuminate the meaning of Section 6(g). The House conference committee report does not mention the provision. *See* H.R. Rep. No. 1142, 63d Cong., 2d Sess. (1914). It is true, as appellees suggest, that the statement of the House managers in the conference report contains some remarks that might be interpreted to limit the commission to adjudication in working out the meaning and applicability of the statutory standard. But we do not read their comments involving application of the Section 5 prohibition against unfair competition to "particular business situations" or their comment that the unfairness of any particular practice "generally depends upon the surrounding circumstances of the particular case" as necessarily foreclosing the use of rule-making to confine issues to be adjudicated and to give specificity to the standard of illegality. *Id.* at 19.

In our judgment, such comments should be interpreted in light of the managers' argument that, in framing a broad standard of unfairness rather than making an item-by-item listing of impermissible practices, the conference felt that such detailed legislative definitions would not "fit business of every sort in every part of this country." *Ibid.* To us, this means that Congress, at the time, felt that different practices in different industries or even similar practices in different industries would often warrant varying treatment by the commission. This is hardly tantamount to saying that practices of individual firms within the same industry necessarily warrant distinctive,

individualized treatment, as appellees would have it. To say this, of course, is to suggest by implication that individual adjudications warrant only minimal precedential value and there is ample reason to believe that the legislators felt otherwise. As the bill's leading proponent, Senator Newlands, said: "We will build up through this commission a system of administrative law that will be as well and thoroughly accepted as to trade as are the decisions of our Interstate Commerce Commission regarding transportation, and we will bring peace and security to the business world." 51 CONG. REC. (Part 11) at 11086.

In our view, the House managers' comments do not foreclose promulgation of substantive rules applicable to practices in a sector of an industry, throughout an industry, or in several industries at large. Rather, they suggest that the commission should administer any rules it might promulgate in much the same way that courts have ordinarily required other agencies to administer rules that operate to modify a regulated party's rights to a full hearing involving application of a statutory standard broader than the rule to his own particular circumstances. That is, some opportunity must be given for a defendant in a Section 5 proceeding to demonstrate that the special circumstances of his case warrant waiving the rule's applicability, as where the rationale of the rule does not appear to apply to his own situation or a compelling case of hardship can be made out. *See* text of the opinion at pages 37-38 *supra* and cases and materials cited therein. So long as the FTC makes available a "safety valve procedure" of this sort, in other words, we cannot see any conflict between the use of substantive rule-making and the concerns evidenced in the House managers' conference report that the commission should not treat varying business practices or defendants in a fashion that fails to appreciate relevant distinctions

among them. This question of when waiver is appropriate or what procedures for waiver are required is not here before us. We have only the question of rule-making power *vel non* under the 1914 Act, but we do not believe the House managers' statements preclude the Commission's power to grant waivers of substantive rules under particularized circumstances.

The comparative print prepared by Senator Newlands to illustrate the differences and changes among the three bills—one passed in the House, one in the Senate, and one produced by the conference—is also cryptic on the rule-making question, but assuredly it does not support appellees' arguments. Indeed, it undercuts them seriously. First, the print suggests that the conference bill deleted the rule-making authority granted in Section 8 of the House bill which, as we have seen, pertained to the characteristics of corporations that would be required to submit reports to the commission. S. Doc., Comparative Print, 63d Cong., 2d Sess., 15 (1914). This suggests that Section 6(g) was entirely new and thus can be assumed to have a different, broader scope than the House bill's provision, particularly since there is no cross reference from Section 6(g) to the authority granted in the House bill. *Id.* at 12. Support for giving Section 6(g) a broad reading may also be derived from the committee's deletion of the "to wit" language in Section 5 in the sentence immediately preceding specification of the hearing, findings, and cease and desist procedure. Since "to wit" came before the procedures spelled out and at the end of a sentence mandating the commission to prevent "unfair competition" in the Senate bill, it can be argued that, by deleting the phrase, the conferees meant that the task of elaborating the statutory standard might be accomplished by means other than adjudication alone.

But it would be a mistake to press these inferences too far. They show only that evidence of clear congressional

rejection or approval of substantive rule-making is scanty on both sides and not compelling. The same conclusion applies to the paucity of comments arguably pertaining to the scope of the agency's rule-making power that occurred in the debates in both Houses prior to final passage. As we read the legislative record, including the comments cited to us by both parties, it seems clear to us that the question of promulgating rules to elaborate the statutory standard and then relying on them in subsequent adjudications was a practice that simply failed to preoccupy those engaging in the post-conference debates. The Senate debates were brief, largely focusing on the question whether the conference committee had made any serious changes in the Senate-passed bill. The floor managers, perhaps seeking to speed passage, argued that only two changes of any moment were made: first, altering the statutory standard from "unfair competition" to "unfair methods of competition," which was said by Senator Cummins of Iowa, a leading proponent of the bill and a member of the conference, to make no difference in the scope of the commission's authority; and second, expanding the scope of judicial review of agency orders from that contemplated in the Senate bill. 51 CONG. REC. (Part 15) at 14768. While such comments would obviously cut against the Commission's claim here, it is clear that the Senators did not entirely agree on this limited characterization of the conference's work. Indeed, Senator Thomas of Colorado argued that it "in many respects is an entirely new bill." *Ibid.* And one early commentator, a lawyer for the National Association of Manufacturers, suggested that Section 6(g) might well be viewed as a mandate for broad rule-making authority, commenting that while he felt the Commission lacked power to "draft a code" of business behavior, there was a "prevalent notion to the contrary." J. EMERY, A HANDBOOK OF THE FEDERAL TRADE COMMISSION ACT (pamphlet, 1915, on file at FTC).

The District Court's opinion and appellees place considerable reliance on a series of comments made on the House floor during the final debate.[18] But we have examined these remarks carefully and must reject the conclusion that they demonstrate a clear intent to preclude substantive rule-making. To us, they seem addressed to the issue whether the commission might have price-fixing power, a proposal that had been offered earlier in the initial House debates on the Covington bill and rejected. In the final debates Congressman Covington, the conference bill's floor manager, described "unfair methods of competition," the statutory standard, as a "vital, elastic principle," and suggested that it would be "expanded" much in the same manner as the law of negligence, fraud, and restraint of trade had been. However, he did not suggest that adjudication alone was the only means by which the commission would do so. *See* 51 CONG. REC. (Part 15) at 14928.

But appellees argue that his subsequent comments demonstrate that this is clearly what he meant. True, in discussing the scope of judicial review of the commission's orders, he carefully differentiated the FTC's power to issue cease and desist orders from the ICC's power to

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[18] As do those commentators who have concluded that the Act's legislative history does not support an assertion of legislative type rule-making power. *See* Weston, *Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor*, 24 FED. B. J. 548, 570 (1964); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 960 (1965); Burrus & Teter, *Antitrust: Rulemaking v. Adjudication in the FTC*, 54 GEO. L. J. 1106, 1125 (1966); Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 490 (1970). One commentator who endorses the FTC's claim finds the legislative history considerably more ambiguous. *See* Wegman, *Cigarettes and Health: A Legal Analysis*, 51 CORN. L. Q. 678, 742-746 (1966). *See also* Note, FTC *Substantive Rulemaking: An Evaluation of Past Practice and Proposed Legislation*, 48 N.Y.U. L. REV. 135, 139-142 (1973).

order new railroad rates, suggesting that limited judicial review was appropriate in the latter case, but not in the former, since it was unquestioned at the time that the ICC, in prescribing rates, was performing an essentially "legislative" task, with immediate effect, while the FTC's essentially prohibitive orders followed adjudicatory proceedings and thus warranted more stringent review. In a quote relied upon by appellees, he went on to say:

> "The Federal trade commission will have no power to prescribe the methods of competition to be used in future. In issuing its orders it will not be exercising power of a legislative nature. The basis, therefore, upon which the validity of the 'narrow' court review provided by the Hepburn Act rests will be lacking.
>
> "The function of the Federal trade commission will be to determine whether an existing method of competition is unfair, and, if it finds it to be unfair, to order the discontinuance of its use. In doing this it will exercise power of a judicial nature. Under the Constitution power to act finally in a judicial capacity can be conferred only upon a court. * * *"

Id. at 14932.

We do not believe this quote forecloses the Commission's claim here. For the power to frame substantive rules, in the context of the FTC, is hardly tantamount to the ICC's power to issue *orders* specifying the prices railroads must thereafter charge. The rules the FTC proposes to issue are not ICC-type orders operating immediately on a designated class of parties at all. They are merely norms which, in the absence of agency-brought proceedings to enforce them, have no legal effect whatever. This is not even a case where the rule alone is determinative of a business' rights without more, as in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), where applicability of the rule meant that rights to a hearing on additional television licenses might well

be cut off. Nor is this a case where a party is penalized in the event he loses at either the FTC or the appellate review level. At this point he may comply and avoid further liability. In other words, there is ample opportunity to test the rule in advance of penalty proceedings. *Compare Oklahoma Operating Co.* v. *Love*, 252 U.S. 331 (1920); *Ex parte Young*, 209 U.S. 123 (1908). Here, the practical efficacy of the rule depends on further Commission action through a complaint, hearing, findings, and order, and then judicial review. Thus, while the kind of rules the FTC may issue may properly be denominated "legislative" in the sense that once they are approved by reviewing courts they state binding propositions of law, they are not exercises of "power of a legislative nature" in the ICC sense in which Congressman Covington was plainly speaking.

This view of Congressman Covington's remarks is buttressed by a reading of one of the cases on which he relied to rebut arguments that the grant of power to the commission to enforce and elaborate the standard of illegality was an unconstitutional delegation of legislative power. *United States* v. *Grimaud*, 220 U.S. 506 (1911), upheld a criminal prosecution for a violation of regulations promulgated by the Secretary of Agriculture under the Forest Reserve Act. Entrusted with the duty under the statute of safeguarding the public forest reserves, the Secretary was empowered by the statute to make regulations controlling access to the reserves and activities carried on in them, violations of which were to be criminally punishable. Although the power to declare what amounted to substantive criminal law was plainly unusual, the Supreme Court upheld the regulations, pointedly arguing that they were to be considered "administrative" rather than "legislative" and thus lawful:

> "That 'Congress cannot delegate legislative power to the President is a principle universally recognized

> as vital to the integrity and maintenance of the system of government ordained by the Constitution.' *Field* v. *Clark*, 143 U.S. 649, 692. But the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense.
>
> * * * *
>
> "The Secretary of Agriculture could not make rules and regulations for any and every purpose. * * * [A]ll relate to matters clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. * * *"

220 U.S. at 521-522. *See also Union Bridge Co.* v. *United States*, 204 U.S. 364, 385-387 (1907) (upholding authorization to Secretary of War to order bridge improvements under the 1899 Rivers and Harbors Act and criminal prosecution for refusal to obey his order). These cases, on which Covington relied in his discussion distinguishing the FTC from the ICC, *see* 51 CONG. REC. (Part 15) at 14932-14933, indicate clearly that, to the extent the FTC might have rule-making power, a specific question to which he did not address himself, this power would certainly be categorized in the parlance of the time as "administrative" rather than "legislative," a rubric whose meaning at the time was confined to the rate-making function. *See Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226-227 (1908), another case noted in Covington's discussion. 51 CONG. REC. (Part 15) at 14932-14933. Thus we believe we are on solid ground in concluding that Covington's remarks, when understood in light of the legal assumptions that clearly bound him, should not be read as either an implicit or an explicit denial of the kind of substantive rule-making power at issue before us.

Appellees also rely heavily on a colloquy between Congressman Sherley of Kentucky and Congressman Stevens

of Minnesota, reprinted in the footnote below.[19] Their discussion seems most accurately interpreted much as we have interpreted Congressman Covington's. In both cases the reference point of comparison was the ICC's power to issue affirmative orders specifying future rates. As we said earlier, substantive rules of the kind at issue here are not to be compared with definitely binding ICC rate orders. They are merely preliminary guidelines for busi-

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[19] "Mr. STEVENS of Minnesota. * * * The Supreme Court has held that the Interstate Commerce Commission does exercise the right of determining whether a rate in existence is unreasonable or unjust. That is a quasi-judicial act and the decision of the commission on that point is reviewable by the courts, because it is a review of a legal decision upon a given state of facts. But when the commission goes further and decides what must be a reasonable rate or practice for the future, of course that is a legislative act which must not and can not be reviewed by the courts any more than could an act of Congress be so reviewed. There is that distinction, and we have carried that distinction into this bill. Whenever the trade commission decides that a certain act is an act of unfair method of competition, the decision on that point as a question of law is, and ought to be, reviewable by the courts. The facts themselves are found by the commission. Its finding as to the facts is conclusive. Its opinion as to whether that state of facts constitutes an act violating the law is its judgment of law upon the facts, and its judgment is and ought to be reviewed, and it is so provided by this bill.

* * * *

"Mr. SHERLEY. If the gentleman will permit, the Federal trade commission differs from the Interstate Commerce Commission in that it has no affirmative power to say what shall be done in the future?

"Mr. STEVENS of Minnesota. Certainly.

"Mr. SHERLEY. In other words, it exercises in no sense a legislative function such as is exercised by the Interstate Commerce Commission?

"Mr. STEVENS of Minnesota. Yes. The gentleman is entirely right. We desired clearly to exclude that authority from the power of the commission. We did not know as we could grant it anyway. But the time has not arrived to consider or discuss such a question."

51 CONG. REC. (Part 15) 14938 (1914).

ness behavior on the basis of which, after the facts are found and no basis for waiver is established, the Commission may issue prohibitory cease and desist orders. While it is true that the Administrative Procedure Act today lumps together the kinds of rules the FTC proposes to issue and "the approval or prescription for the future of rates" under the denomination "rule," 5 U.S.C. § 551 (4) (1970), it is clear that the understanding of those who focused on the question in 1914 saw a clear distinction between them. Thus we decline to conclude that the clear references in the final House floor debate to the ICC's rate-making power should be extrapolated to cover the issuance of substantive rules enforceable only in agency adjudication. The utterly unhelpful quality of the floor comments is underscored by Congressman Stevens' remarks. If one ignores the "legislative"—"administrative" technical distinction which influenced Covington and utilizes a more practical, broader conception of "legislative" type activity prevalent today, they can be read to support substantive rule-making of the kind asserted by the agency:

> "This measure, for the first time in this country, attempts an administrative regulation of commerce itself. We have regulated the instrumentalities such as transportation and finance, but here we attempt to rule and help commerce. An executive alone with power of enforcement merely, or even a wise discretion, could not do it. The courts under their ruling could not wisely and liberally accomplish the needed results. *The legislative branch can only prescribe rules for the future. It requires a combination of all those powers in one organization, with the highest obtainable talent well and thoroughly to work out the difficult problems which will be met.* Because it is in a sense permanent and without partisanship, and can lay down a policy which can be pursued or changed as may be wise and necessary, without the charge of

> personal or political advantage, must this important commission perform such work."

51 CONG. REC. (Part 15) at 14939. (Emphasis added.)

Thus the history of the pertinent 1914 debates leaves us with a few affirmative indications that Section 6(g) encompassed substantive rule-making and a few cryptic indications that this is not so. As a consequence, the need to rely on the section's language is obvious.

Order Correcting Opinion

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1972

No. 72-1446

NATIONAL PETROLEUM REFINERS ASSOCIATION, *et al.*,
Appellees,

v.

FEDERAL TRADE COMMISSION, *et al.*,
Appellants
ENVIRONMENTAL DEFENSE FUND, INC., CONSUMERS UNION
and CONSUMER FEDERATION OF AMERICA,
Intervenors-Appellants

Before: WRIGHT, Circuit Judge

ORDER

It is ORDERED, *sua sponte*, that the opinion filed herein on June 27, 1973 be amended as follows:

1. To footnote 12, page 15, after substituting a semicolon for the last period, add:
Weinberger v. *Hynson, Westcott & Dunning, Inc.* —— U.S. ——, —— 41 U.S. L. WEEK 4848, 4852-4853 (June 18, 1973) (upholding authority of Food & Drug Administration to issue declaratory orders classifying similar products as "new drugs" under § 5(e) of the Administrative Procedure Act, 5 U.S.C. § 554(e) (1970), against challenge that individualized proceedings involving each manufacturer were required); *cf. Weinberger* v. *Bentex Pharmaceuticals, Inc.*, *supra* note 10, —— U.S. at ——, 41 U.S. L. WEEK at 4860 (endorsing FDA

expert-drawn "monographs" to determine whether products are "new drugs" within the meaning of 21 U.S.C. § 321(p)(1) (1970)).

2. To page 21, 9th line from the top, immediately after "*cf.*" insert:

Weinberger v. *Bentex Pharmaceuticals, Inc.*, —— U.S. ——, ——, 41 U.S. L. WEEK 4858, 4861 (June 18, 1973); *Weinberger* v. *Hynson, Westcott & Dunning, Inc., supra*, —— U.S. at ——, 41 U.S. L. WEEK at 4853;

3. On page 36, add to the paragraph ending with "claim.":

"In a case much more clouded with doubts than this one, we held that we would not 'in the absence of compelling evidence that such was Congress' intention . . . prohibit administrative action imperative for the achievement of an agency's ultimate purpose.' *Permian Basin Area* Rate Cases, 390 U.S. 747, 780." *Weinberger* v. *Bentex Pharmaceuticals, Inc., supra*, —— U.S. at ——, 41 U.S. L. WEEK at 4861.

4. On page 38, at the 15th line of the paragraph beginning with "Moreover," after substituting a semicolon for the period in that line, add:

"*See, also, Weinberger* v. *Bentex Pharmaceuticals, Inc., supra*, —— U.S. at ——, 41 U.S. L. WEEK 4860-4864; *Weinberger* v. *Hynson, Westcott & Dunning, Inc. supra*, —— U.S. at ——, 41 U.S. L. WEEK 4851-53.

Order Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1972

No. 72-1446

NATIONAL PETROLEUM REFINERS ASSOCIATION, *et al.*,
Appellees,

v.

FEDERAL TRADE COMMISSION, *et al.*,
Appellants

ENVIRONMENTAL DEFENSE FUND, INC., CONSUMERS UNION and the CONSUMER FEDERATION OF AMERICA,
Intervenors-Appellants

Before: BAZELON, Chief Judge; WRIGHT and ROBINSON, Circuit Judges.

ORDER

On consideration of appellees' petition for rehearing, it is

ORDERED by the Court that appellees' aforesaid petition is denied.

Per Curiam

Dated: August 6, 1973.

No. 73-806

NOV 30 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL PETROLEUM REFINERS ASSOCIATION, ET AL.,
Petitioners,

v.

FEDERAL TRADE COMMISSION, ET AL., *Respondents*

BRIEF ON BEHALF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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November 30, 1973

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-806

NATIONAL PETROLEUM REFINERS ASSOCIATION, ET AL.,
Petitioners,

v.

FEDERAL TRADE COMMISSION, ET AL., *Respondents*

BRIEF ON BEHALF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

GENERAL STATEMENT

On June 30, 1969, the Federal Trade Commission (FTC) published a proposed Trade Regulation Rule (34 Fed. Reg. 12449) declaring that failure to post octane numbers on gasoline pumps at service stations would be an "unfair method of competition" and a "deceptive act or practice" within the meaning of section 5 of the Federal Trade Commission Act (15 U.S.C. § 45). Following hearings and the sub-

mission of comments by interested parties, and issuance of a revised Rule (36 Fed. Reg. 354, December 30, 1970), later postponed (36 Fed. Reg. 7309), a substantially revised Octane Posting Rule was issued on December 16, 1971, to be effective March 15, 1972 (36 Fed. Reg. 23871).

This case was instituted on March 29, 1971 by two trade associations and 34 gasoline refining companies in order to test the authority of the FTC to promulgate legislative rules such as the Octane Posting Rule. The District Court for the District of Columbia granted plaintiffs' motion for summary judgment on April 4, 1972 (340 F.Supp. 1343). The Court of Appeals for the District of Columbia, on June 27, 1973, reversed the District Court, holding that the FTC has power to issue such legislative rules (482 F.2d 672).

The plaintiffs have petitioned this Court for a writ of certiorari, filed November 20, 1973. The American Bankers Association submits this brief as amicus curiae in support of the request for review of the decision of the Court of Appeals. Consent of the Government and of the petitioners has been obtained by letters dated November 14, 1973.

INTEREST OF AMICUS CURIAE

The American Bankers Association is a trade association having as its members some 13,500 banks. About 4,500 of these banks are national banking associations, chartered, examined, and supervised by the Comptroller of the Currency under the National Bank Act, and about 9,000 are State banks chartered under the banking codes of the several States and examined and supervised both by the appropriate State banking supervisory officials and, in most cases,

also either by the Board of Governors of the Federal Reserve System (in the case of State member banks) or by the Federal Deposit Insurance Corporation (in the case of State nonmember insured banks).

Even though expressly exempted from the FTC Act (15 U.S.C. § 45 (a)(6)), banks can be substantially affected by rules of the Federal Trade Commission.[1] For example, in 1971 the FTC published a proposed Trade Regulation Rule entitled "Preservation of

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[1] In a statement supplied by the FTC for the record after its testimony had been completed at the 1973 hearings on the Consumer Product Warranties—FTC Improvements bills, the FTC has taken an extremely narrow view of the exemption for banks.

> Opinion as to Whether Rulemaking Extends to Financial Institutions
>
> In providing the Commission jurisdiction over unfair methods of competition and unfair or deceptive act or practices in commerce, Section 5 of the Federal Trade Commission Act excepts "banks" and a number of other specific categories of business from the Commission's enforcement authority under that section. No exception is made by Section 5 for financial institutions other than banks.
>
> The Commission believes, however, that it would clearly defeat the policy and provisions of the Act to hold that the exemption accorded to banks must be construed to embrace even those activities which lie outside the sphere of a bank's essential functions and are not incidental to those functions. We believe, therefore, that our rules of general application do extend to activities which are carried on by banks in common with other types of business institutions. (Hearings before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, on H.R. 20 and H.R. 5021, 93d Cong., 1st Sess., Serial No. 93-17, at 80, March 19, 1973.)

This Association, of course, disagrees completely with this novel interpretation. While the scope of the exemption for banks is not relevant to this case, the position taken by the FTC in its opinion gives the members of this Association an additional basis for interest in the authority of the FTC to issue legislative rules.

Buyers' Claims and Defenses in Consumer Installment Sales" (36 Fed. Reg. 1211, 6592, and 7865, January 26, April 7, and 27, 1971; 37 Fed. Reg. 892, January 5, 1973), which would have abolished the holder in due course doctrine and waiver of defense provisions in consumer installment obligations and credit card agreements. This Association, the Consumer Bankers Association, and the two major bank card associations —Interbank Card Association and National Bank-Americard, Inc.—filed a total of five statements at various stages of this proceeding, objecting to the proposed rule on several grounds including the argument that the FTC has no authority to issue legislative rules.

The proposed rule would prohibit merchants from acquiring from customers any obligations subject to the holder in due course doctrine or any credit card obligations based on an agreement between the card issuer and the card holder which contained a waiver of defense provision. While this rule on its face applies only to the relations between merchants and their customers, the effect on the banks which have been financing these transactions by the purchase of consumer paper or through bank card systems is direct and substantial. The proposal would cut across the complex and highly integrated network of State laws applicable to bank transactions, including the Uniform Commercial Code, and it would require substantial alterations to bank card arrangements, possibly to the extent of making bank card systems unworkable.[2] The FTC has not yet taken final action on this rule.

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[2] Many States have enacted statutes restricting the effectiveness of the holder in due course doctrine in consumer transactions and waiver of defense provision in credit card agreements (see, for

The importance of consumer credit to the nation's economy, as well as to consumers, may be seen from the following table.

CREDIT OUTSTANDING TO INDIVIDUALS

($ Billions)

Year End	Consumer Credit Outstanding			1-4 Family Mortgage Debt Outstanding
	Installment	Noninstallment	Total	
1939	4.5	2.7	7.2	16.3
1945	2.5	3.2	5.7	18.6
1955	28.9	9.9	38.8	88.2
1965	71.3	19.0	90.3	212.9
1970	101.2	25.6	126.8	280.2
1971	109.5	27.7	137.2	307.8
1972	127.3	30.2	157.5	346.1

Source: Federal Reserve Board

The rule on Preservation of Buyers' Claims and Defenses would affect consumer transactions. The rulemaking authority of the FTC, as interpreted by the Court of Appeals, would apply equally to industrial and commercial activities of all sorts (other than those of the exempted concerns), and indirect effects on

example, Calif. Civil Code § 1747.90, § 1804.1, 2, § 1810.7, and § 2983.5, 7; D. C. Code §§28-3807-3809). The National Conference of Commissioners on Uniform State Laws spent years in drafting the Uniform Consumer Credit Code, approved by the Conference and the American Bar Association in 1968, in an effort to present a balanced and integrated proposal for the reform of consumer credit laws, including restrictions on the holder in due course and waiver of defense doctrines. This Code has been adopted in six States (28 The Business Lawyer 641, footnote 6). The Senate on July 23, 1973, passed S. 2101, 93d Congress, which would impose restrictions on waiver of defense provisions in credit card transactions (119 Cong. Rec., p. S14403, daily ed., July 23, 1973).

banks and other exempt industries can be expected as in the case of that Rule.

Accordingly, in spite of the exemption for banks expressly provided in the FTC Act, the banks which are members of this Association have a real and substantial interest in the question of the authority of the FTC to issue legislative rules.

THE SIGNIFICANCE OF THE DECISION OF THE COURT OF APPEALS THAT THE FTC HAS AUTHORITY TO ISSUE LEGISLATIVE RULES

Up until some 10 years ago the FTC limited its enforcement activities under the FTC Act to quasi-judicial proceedings, directed at individual concerns, on the basis of specific charges, responses, and adversary hearings, as expressly provided in section 5 of the Act.[3]

In 1962 the FTC formally announced that it would undertake rulemaking proceedings and would issue Trade Regulation Rules, which it is now clear would be generally applicable and would have the force and effect of law (27 Fed. Reg. 4636, 4796).

In this case for the first time since the creation of the FTC the courts are faced with the question

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[3] The FTC was specifically granted authority to issue rules and regulations under several statutes which declared that misbranding or false labeling of certain products was an unfair method of competition and an unfair and deceptive act or practice and therefore unlawful under the FTC Act, and which authorized FTC to spell out in rules what was correct and what was false labeling: for example, the Fur Products Labeling Act, 15 U.S.C. § 69 (1951); the Flammable Fabrics Act, 15 U.S.C. §§ 1191 ff. (1953); and the Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451 ff. (1966).

whether the FTC Act permits this new departure from its original practice.[4]

Section 5 of the FTC Act, as enacted in 1914, declared "unfair methods of competition in commerce" unlawful, and authorized the FTC to prevent persons, partnerships, or corporations, except banks and common carriers subject to the Interstate Commerce Act, from using such methods; it also directed the FTC to initiate a proceeding against any such person, partnership or corporation which it has reason to believe is or has been using "any unfair method of competition" (38 Stat. 717). In 1938 the section was amended by adding to the proscribed activities "unfair or deceptive acts or practices" and any "unfair or deceptive act or practice" (52 Stat. 111). The exemption for banks and common carriers has been broadened to include certain regulated air carriers and certain regulated packers and stockyards.

The field of authority of the FTC covers the entire sweep of the commerce clause, with these very limited exceptions. The FTC's power within this field is equally broad—to prevent "any unfair method of competition", or any "unfair or deceptive act or practice".

The authority to institute specific quasi-judicial proceedings against unfair methods of competition under this authority is a powerful instrument, which was felt to be necessary in 1914 because formal judicial

[4] In Bristol-Myers Co. v. FTC, 284 F.Supp. 745 (D.D.C. 1968), *aff'd in pertinent part*, 424 F.2d 935 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 824 (1970); and Lever Bros. v. FTC, 325 F.Supp. 371 (D. Me. 1971), the courts refused to enjoin proceedings preliminary to the issuance of Trade Regulation Rules, because the proposed rules, prior to promulgation, were not ripe for adjudication.

proceedings under the Sherman Anti-Trust Act had not accomplished all that the Congress felt was needed. Its effectiveness was increased in 1938, when unfair or deceptive practices were also prohibited.

To transform the FTC's authority to conduct these case-by-case quasi-judicial proceedings into a delegation of Congressional legislative authority to issue legislative rules covering virtually the entire field of commerce and any unfair method of competition and any unfair or deceptive act or practice is a major step, with incalculable effects on the nation's economy, on Congressional responsibilities, and on Federal-State relationships.

The extraordinary scope of the authority claimed, and its virtually limitless effect on the nation's economy and on the Federal system of government, may be judged by a few examples of the kinds of situations where the FTC has already asserted that the authority would permit them to act: cigarette labeling (16 C.F.R. § 408, superseded by 15 U.S.C. § 1331); games of chance in the food retailing and gasoline industries (16 C.F.R. § 419); mailing unsolicited credit cards (16 C.F.R. § 421, superseded by 15 U.S.C. § 1642); Cooling Off Period for Door-to-Door Sales (16 C.F.R. § 429, effective date to be announced); the proposed rule on Preservation of Buyers' Claims and Defenses in Consumer Installment Sales, discussed above; a proposed rule on the sale of franchises (36 Fed. Reg. 21607, 22187); and the Octane Posting Rule involved in the present case (16 C.F.R. § 422). (For other examples, see 16 C.F.R. §§ 400-429.)

The FTC has made it clear, in a press release issued July 17, 1973 announcing a realignment of its Bureau

of Consumer Protection, that it plans to make full use of this rulemaking authority:

> In view of the recent Court of Appeals' decision in the *Octane* trade regulation rule proceeding, a main thrust of the Bureau's work should be a definitional one—further fleshing out the meaning of "unfairness" and "deception." Effective use of our rulemaking authority is absolutely essential to carry out this assignment.
>
> Since rulemaking is so essential to the work of the *entire* Bureau, the separate division which has handled it exclusively has been eliminated and instead the various operating divisions will be responsible for developing rules. This will give all Bureau attorneys the option to proceed either by rulemaking or by litigation in the areas where they have developed substantive expertise.

The authority claimed by the FTC to issue legislative rules covering any unfair method of competition and any unfair or deceptive acts or practices in commerce would appear to enable the FTC to regulate almost all of the economy of the United States. It would enable the FTC to take over a substantial part of Congressional responsibilities—for example, it would seem that most disclosure provisions in the Truth in Lending Act (15 U.S.C. §§ 1601 ff.) and the Securities Act of 1933 (15 U.S.C. §§ 77a ff.), and many provisions of pending bills, for example, the Fair Credit Billing bill (S. 2101, 93d Congress), and the Consumer Product Warranties bills (S. 356, H. R. 20, H.R. 7917, 93d Congress) might well have been or could be issued as Trade Regulation Rules under the FTC's assertion of authority.

In addition it would seem that the authority claimed by the FTC would enable it to negate or supersede

many State laws. The proposal on Preservation of Buyers' Claims and Defenses would supersede parts of the Uniform Commercial Code. It has been suggested that the FTC might issue rules concerning the interest practices of lending institutions, presumably superseding State usury statutes.[5]

The FTC has reported to the House Appropriations Committee, in its budget request for FY 1974, that it is making a study of the debtor-creditor relationship, including the fairness of such remedies as blanket security interests, repossessions, deficiency judgments, wage assignments, cognovit notes, and acceleration clauses. The FTC went on to indicate that it might issue rules covering the field of creditors' remedies and other aspects of consumer contracts.

> If the Commission's rulemaking authority is reinstated, the results of this study will be utilized to assist in the development of a model retail installment contract. Such a contract could be mandated throughout the industry as a trade regulation rule. . . .[6]

Whatever may be thought of the merits of these proposals—and this Association has supported many legislative proposals in this field—it seems clear that a delegation to an agency which would enable it to undertake such a broad program of regulation of the economy, which would enable it to take over such substantial Congressional functions, and which would

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[5] Hearings before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, on H.R. 20 and H.R. 5021, 93d Cong., 1st Sess., Serial No. 93-17, at 88, March 19, 1973.

[6] Hearings before a Subcommittee of the House Committee on Appropriations on Agriculture—Environmental and Consumer Protection Appropriations for 1974, 93d Congress, 1st Session, Part 6, *Consumer Programs*, at 926.

enable it to supersede such a large body of State legislation, would have the gravest consequences both to our economy and to our system of government.

Unlike the authority delegated to the FTC to issue rules filling in the gaps and defining terms within the framework of fairly detailed and specific statutes like the Fur Products Labeling Act and the Flammable Fabrics Act, the broad and sweeping authority asserted by the FTC is the kind of legislative authority vested in the Congress and the State legislatures by the Federal and State constitutions. The issues are true legislative issues, involving conflicting public interests of substantial moment, which under the Constitution have been and should be decided by legislatures elected by and responsible to the voter.

Such a major delegation of legislative authority from the Congress to an agency, if such powers can constitutionally be delegated, should be conferred in the clearest and most explicit terms; it should not be inferred from ambiguous provisions in statutes.

Earlier this year this Court considered the Federal Reserve Board's authority to issue legislative rules under the Truth in Lending Act in *Mourning* v. *Family Publications Services, Inc.*, 411 U.S. 356 (1973), and upheld the rule involved. The Truth in Lending Act covers a limited sphere of activity—principally the disclosure of certain information about consumer credit—and it contains explicit and detailed statutory provisions covering much of the field. Nevertheless, the Committee reports and floor discussions of the bill make it abundantly clear that legislative rulemaking authority within the specific framework of the Act was considered essential. Section 105 of the Act, accordingly, contains a very broad and very specific provision requiring the Board

to prescribe regulations to carry out the purposes of the Act, with express authorization for such classifications, differentiations, or other provisions, and for such adjustments and exceptions, as in the judgment of the Board may be necessary or proper to effectuate the purposes of the Act, to prevent circumvention or evasion or to facilitate compliance. The provisions for administrative enforcement in section 108 apply clearly to any requirements imposed under the Act, and section 112 provides criminal penalties for a creditor who gives false or inaccurate information or who fails to provide information "he is required to disclose under the provisions of this title or any regulation issued thereunder." The distinction between the Board's legislative rules and the procedural rules of other agencies is emphasized in subsection 108(d), which provides that the authority of the Board to issue regulations does not impair the authority of any of the enforcement agencies "to make rules respecting its own procedures in enforcing compliance with requirements imposed under this title".

The limited provision in section 6 of the FTC Act authorizing the FTC to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of the Act, included as the seventh paragraph in a section concerning investigations, reporting, and other housekeeping matters, contrasts sharply with the broad and explicit rulemaking authority granted to the Federal Reserve Board contained in the Truth in Lending Act. The clear intent in the legislative history of the Truth in Lending Act to authorize the Board to issue substantive rules contrasts just as sharply with the negative legislative history of the FTC Act.

THE CONGRESS NEEDS A DEFINITIVE RULING NOW

A review of the decision of the Court of Appeals by this Court as to the authority of the FTC would eliminate the confusion and uncertainty which is apparent in the legislative proceedings of the current Congress.

On September 12, 1973 the Senate passed a bill, S. 356, 93d Congress, from which the Senate Commerce Committee struck a provision authorizing the FTC to issue legislative rules, under limited and restricted conditions. The FTC requested this change in the belief that the Court of Appeals would decide in this case that the FTC already had the authority without statutory limitations or restrictions (Senate Report No. 93-151, pp. 57-58). The Committee Report does not mention the deletion of the rulemaking provision, and it gives no indication whether the members of the Committee who deleted the provision shared the FTC's hope, or whether they did not want to grant this authority to the FTC, or whether they were anxious to pass the product warranty provisions of the bill and leave the decision on the rulemaking authority of the FTC to the courts or to later Congressional action.[7]

The Committee on Interstate and Foreign Commerce of the House of Representatives, on the other hand, is considering a bill, H.R. 7917, 93d Congress,

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[7] Reprinting the FTC's letter in Committee Report No. 93-151 might suggest approval of the position taken in the letter. However, the following sentence, at page 9 of the same Report, appears to be a much stronger suggestion that the Senate Commerce Committee does not think the FTC has legislative rulemaking authority:

> "Thus the sole enforcement weapon available to the FTC to police the vast majority of consumer frauds, deception, and cheating has been the cease and desist order."

containing a provision similar to the provision deleted from S. 356, which would specifically authorize the FTC to issue substantive rules, under limited terms and conditions.[8]

Controversy over similar proposals to grant rulemaking authority to FTC was a significant factor in the failure of the 92d Congress to enact a Consumer Product Warranties bill (see S. 986 and H.R. 4809, 92d Congress).

Until the Congress has a clear and definitive statement from this Court as to whether the FTC already has legislative rulemaking authority under the existing FTC Act, it cannot legislate rationally in this field. A legislator who votes for S. 356 cannot know whether this vote is a vote for unrestricted legislative rulemaking authority for the FTC or a vote against any legislative rulemaking authority at all in the FTC. A legislator who votes for H.R. 7917 cannot know whether this vote is a vote to grant limited legislative rulemaking authority to the FTC or a vote to restrict ex-

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[8] A New Title III was added to S. 356 by the Senate Committee on Banking, Housing and Urban Affairs in lieu of section 212 as reported in the Commerce Committee. This would give the Federal Reserve Board rulemaking authority with respect to unfair or deceptive practices of depository financial institutions, with enforcement delegated to the five supervisory agencies (S. Rep. No. 93-280). This Association supported this proposal, in the light of the limited area affected and in the light of the record of the Board's imaginative yet restrained rulemaking under the Truth in Lending Act (Report of the National Commission on Consumer Finance, December 1972, at 57). S. 356 was passed by the Senate on September 12, 1973 (119 Cong. Rec. S16421, daily ed., September 12, 1973). A similar provision was added to H.R. 7917 in the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce before the bill was reported to the full Committee on November 12, 1973.

isting unlimited legislative rulemaking authority already in the FTC.

A clear and definitive statement of the effect of present law would enable the Congress to write into the new legislation whatever provisions it considers necessary to carry out its legislative policies.

CONCLUSION

In view of the vital issue raised by the decision of the Court of Appeals—the sweeping delegation of legislative rulemaking authority, with incalculable effects on Congressional responsibility, on Federal-State relationships, and on commercial activities in general and on banking in particular—The American Bankers Association urges this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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November 30, 1973

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-806

NATIONAL PETROLEUM REFINERS ASSOCIATION, ET AL.,
Petitioners,

v.

FEDERAL TRADE COMMISSION, ET AL.,
Respondents.

BRIEF AMICUS CURIAE OF NATIONAL CONSUMER FINANCE ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF NATIONAL CONSUMER FINANCE ASSOCIATION [1]

The National Consumer Finance Association (hereinafter referred to as "NCFA"), organized in 1916, is a national trade association of companies engaged in the consumer credit business, representing over 1,000 member companies operating over 18,600 loan and finance offices. It represents organizations ranging from a single small office to substantial nationwide chain organizations. The business of these companies is primarily direct credit

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[1] By letter dated November 14, 1973, the Solicitor General of the United States consented to the filing of this Brief; by letter dated November 16, 1973, counsel for the Petitioners likewise consented. Copies of this correspondence have been filed with the Clerk.

lending to consumers and the purchase of sales finance paper on consumer goods. However, some members have retail subsidiaries, others are subsidiaries of manufacturers, others are subsidiaries of highly diversified corporations, and since the 1970 Amendments to the Bank Holding Company Act, especially pursuant to the provisions of 12 U.S.C. § 1843(c)(8), a growing number are subsidiaries of bank holding companies.

The consumer credit business, in which all NCFA member companies are engaged, has been traditionally governed by state statutes and regulations requiring strict formalities with respect to documents, forms, and customer disclosures. Indeed, the "consumer finance industry is still the most heavily regulated segment of the consumer credit industry." Report of the National Commission on Consumer Finance (GPO, Dec. 1972), p. 45. Moreover, Congress, in recognition of legislative responsibilities in the consumer credit area, has in recent years placed certain aspects of the consumer credit business under Federal control, including the Consumer Credit Protection Act, of which the Truth in Lending Act is a part. 15 U.S.C. §§ 1601 *et seq.* (1968). Under the Truth in Lending Act, although the Federal Reserve Board is explicitly charged with responsibility for prescribing implementing regulations (Regulation Z), the Federal Trade Commission has responsibility for enforcing these regulations as to the consumer finance industry. 15 U.S.C. §§ 1604, 1607(c).

Of the $142 billion total consumer installment credit outstanding from all credit grantors at the end of September, 1973, as reported by the Federal Reserve Board, finance companies held $36 billion or over 25% of such credit. It can be readily seen that the companies represented by NCFA hold a significant portion of the total consumer installment credit outstanding in the United States, and thus, they perform an important function in the American economy.

In the last few years the Federal Trade Commission has been engaged in a broad investigation of various trade practices with respect to the extension of credit and debt collection. This activity has focused to a large extent on traditional creditors' remedies, many or all of which are expressly sanctioned by state law. The Federal Trade Commission presently has under consideration the promulgation of industry-wide trade regulation rules which would define and proscribe acts or practices allegedly unfair or deceptive to consumers in connection with the extension of credit and creditors' remedies. These rules would abrogate numerous presently existing state laws and, accordingly, judicial resolution of the unsettled question of the Commission's statutory authority for promulgating such rules is of utmost importance to NCFA.

ARGUMENT

The issue presented in this case, and which should be reviewed by this Court, is whether the Federal Trade Commission Act of 1914 (15 U.S.C. §§ 45 *et seq.*) grants the Federal Trade Commission ("Commission" or "FTC") authority to issue industry-wide trade regulation rules having the binding effect of substantive law to enforce the Act's prohibitions against "unfair methods of competition" and "deceptive practices."

I. Regulation of the Consumer Credit Industry is an Extremely Complex Problem Requiring a Legislative Resolution

Historically, states have closely regulated the consumer credit industry, creating, altering and abolishing various creditors' remedies and debtors' and creditors' rights. In recent years, the rapid growth of the industry has put increasing stress on ancient legal doctrines developed and sanctioned by the states. More recently, the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.*, expressly con-

ferred rulemaking authority on the Federal Reserve Board to implement meaningful disclosure of credit terms to consumers and to facilitate compliance with the Act. Congress conferred this responsibility on the Board because it possessed the "necessary experience and resources to monitor [the] operation [of the Act]." *Mourning* v. *Family Publication Service, Inc.*, 411 U.S. 356, 365 (1973). Other Federal agencies also exercise varying degrees of supervisory and regulatory authority over various segments of the consumer credit industry (Comptroller of the Currency, Federal Deposit Insurance Corporation, Federal Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, National Credit Union Administration).

Moreover, the Ninety-Second Congress and the current Ninety-Third Congress have had under consideration legislation dealing with many of the same issues being considered by the FTC under its claimed rulemaking authority. On April 17, 1972, the Senate Committee on Banking, Housing and Urban Affairs rejected a measure somewhat comparable to the proposed FTC "holder-in-due-course" rule[2] (S. Rep. No. 92-750 (April 17, 1972), p. 13) stating:

> One of the great virtues of the Federal System of government is the opportunity for subunits of the governmental system to experiment with governmental concepts where they are not preempted by the national government, which process can test many different modes of governing in such areas and lead to superior governing concepts. The question of policy formulation in regard to the "Holder-in-Due-Course Doctrine" appears to be an area which is very suitable for this process, and *the Committee therefore prefers to withhold Federal preemption of policy-making in this field for the present time.* (Emphasis supplied)

[2] 36 Fed. Reg. 1211-12 (January 26, 1971).

Efforts to reinsert these provisions by amendments to the bill were rejected by the full Senate during floor debates. *Cong. Rec.* S6901, D454-55 (daily ed. April 27, 1972).

Over a year later, on July 23, 1973, the Senate passed the Fair Credit Billing Act of 1973, S. 2101 (93d Cong., 1st Sess.) containing a provision (Section 170) analogous to the FTC's revised proposed trade regulation rule on the same subject.[3] However, the Senate bill contained *inter alia* geographic and dollar limitations not contemplated by the FTC.

Significantly, if Congress in 1914 had granted pervasive rulemaking power to the FTC, subsequent creation by Congress of various supervisory and regualtory agencies with jurisdiction over the consumer credit industry would have been to some extent unnecessary and superfluous. The FTC, with its claimed substantive rulemaking power, would have had full authority and power to duplicate activities of at least some of these agencies. Moreover, obvious Congressional doubts about FTC rulemaking authority can be seen from conflicting current legislation dealing with issues identical to those addressed by the FTC's proposed trade regulation rules. Problems and issues in the consumer credit industry are multifaceted in nature and their resolution requires a legislative answer which only Congress can supply.

II. The FTC's Announced Rulemaking Activities Have Created Confusion and Uncertainty Within the Consumer Finance Industry

Because the FTC is attempting to exercise a power neither contemplated nor provided for in its enabling Act of 1914, its announced rulemaking activities create a discriminatory situation among various financial institutions engaged in the extension of consumer credit. For

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[3] 38 Fed. Reg. 892-94 (January 5, 1973).

example, under the FTC Act, banks are exempt from the Commission's jurisdiction to prevent unfair or deceptive acts or practices on consumers. 15 U.S.C. § 45(a)(6). Thus, although all credit grantors engage in essentially similar activities, the FTC's announced rulemaking proposals would apply to one segment of the consumer credit industry while another segment may continue to operate without the restrictions imposed by these proposed rules. Moreover, due to the rather unique and technical problems of the consumer finance industry, Federal regulatory and supervisory agencies with affirmative duties in this area may differ with the FTC as to what constitutes an unfair or deceptive act or practice in the consumer finance field. The FTC's lack of expertise in this area promises to skew the delicate balance of competition in the industry. By issuing blanket rules proscribing and prescribing methods of competition in the consumer credit industry, the FTC will subject one segment of the industry (consumer and sales finance companies and nonbank credit card companies) to rules lacking the depth of expertise governing rulemaking authority in other segments of the industry.

Both Congress and the legislatures and regulatory agencies of the states have continually regulated the consumer finance industry with an understanding of its unique problems. Historically, Congress left this regulatory responsibility primarily in the control of the states while creating numerous Federal supervisory and regulatory agencies to supplement state regulation. A comprehensive regulatory system now governs the consumer finance industry and Congress is currently considering additional legislation designed to resolve industry problems. The FTC's recent announcements and various proposed trade regulation rules have created confusion, conflicting responsibilities, doubts over needed legislation and general uncertainty on the part of both Congress and the state legislatures.

CONCLUSION

If the question decided by the Circuit Court of Appeals with respect to the authority of the FTC to issue trade regulation rules is not resolved by this Court, the uncertainty and confusion surrounding the authority of the FTC to issue legislative-type, substantive rules will persist. Undoubtedly more litigation on this basic question of the FTC's statutory authority will ensue. Only this Court can finally settle this question of national importance to the American economy.

WHEREFORE, for these reasons, the National Consumer Finance Association respectfully submits that the Petition for a Writ of Certiorari should be granted.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE FOR THE NATIONAL RETAIL MERCHANTS ASSOCIATION

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BRIEF AMICUS CURIAE FOR THE NATIONAL RETAIL MERCHANTS ASSOCIATION

Interest of Amicus Curiae

The National Retail Merchants Association ("NRMA") is a national trade association representing more than 2,000 department store and specialty store members, which operate some 26,000 retail outlets throughout the United States. Its members range from the largest nationwide department store chains to small neighborhood apparel stores.*

* NRMA has received consent from the parties to file this brief in support of the petition for a writ of certiorari. Consent was received from the Solicitor General by letter dated November 27, 1973, and consent was received from petitioners by letter dated November 29, 1973. Both letters have been filed with the Clerk of this Court.

The principal business of NRMA members is to sell goods to and provide services for consumers. Virtually every phase of their advertising, marketing and service activities is subject to the prohibitions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (hereinafter "Section 5") against unfair methods of competition and unfair or deceptive trade practices.

Section 5 embraces the antitrust laws. It embodies as well additional principles designed to reach less defined anti-competitive behavior. It also draws upon the common law and upon basic community concepts of business propriety. Through almost sixty years of enforcement, Section 5 has been given content by decisions of the Commission based upon facts developed and tested in adjudications, with full rights to contest and full judicial review on the basis of a factual record. While five Commissioners thus have broad discretion, that discretion is saved from administrative fiat by the constraint that decisions be based upon probative and tested facts.

The decision below would now vest in the five Commissioners the authority to issue substantive rules of business conduct under the Federal Trade Commission Act. This is authority to hand down the law based upon such facts or nonfacts as the Commission may choose, and to entertain comment with minimal obligation to take heed. It would permit the Commission to practice legislative art subject only to the possibility that a court, handicapped by the absence of a genuine record of probative facts, may find Commission pronouncements "arbitrary or capricious." Given the reach of the Federal Trade Commission Act and the breadth of the standards under Section 5, the authority is, in fact, power to regulate by code every detail of the American economy.

The effect of the decision below can be seen in its impact upon the microcosm of the retailer. The new authority

to regulate reaches into the myriad day-to-day advertising, selling and marketing practices of each of NRMA's retailer members. That has been the actual fact during the past few years in which the Commission has first ventured to assert its newly claimed code power.* Indeed, the thousands of categories of merchandise and services advertised and sold by NRMA members, and their varying methods of purchase, distribution, and marketing, make it difficult to envision trade regulation rules which would not have an impact upon retailers.

As the court below observed, the question of whether the Commission is "empowered to promulgate substantive rules of business conduct" is an "important" one (Petitioners' Appendix, p. 31). The question goes far beyond the merits of the Octane Posting Trade Regulation Rule involved in this case, 16 C.F.R. § 422 (1972), or any other particular trade regulation rule. Were the Commission simply asserting its authority to state its views of the law to the public, to indicate its enforcement intentions, or to furnish guidance in the form of advice, this would be consistent with the principles that have governed in the past. But that is

* NRMA has in recent years submitted statements to the Federal Trade Commission in connection with such trade regulation rules as those dealing with: the incandescent lamp industry, 16 C.F.R. § 409 (1971); retail food advertising and marketing practices, 16 C.F.R. § 424 (1971); discriminatory practices in the men's and boys' tailored clothing industry, 16 C.F.R. § 412 (1968); care labeling of textile wearing apparel, 16 C.F.R. § 423 (1972); cooling-off periods for door-to-door sales, 16 C.F.R. § 429 (1972); and the preservation of consumer claims and defenses, 36 Fed. Reg. 1211 (1971). Representatives of NRMA have appeared and testified at hearings held by the Commission with respect to a number of these proposals. In each of these submissions or appearances, NRMA has either specifically addressed the issue involved in this case, or it has referred to and reaffirmed its views on this issue expressed in previous submissions. Thus, NRMA has upon a number of occasions been directly involved in the significant issue of administrative law which is being sought to be resolved herein.

not the case. The authority here asserted to regulate the market place by code is a revolutionary break with the past.

The issue cannot be left unresolved. With the decision of the court below, the Commission will proceed to issue its codes, and businesses must continue to operate in the market place. Under these circumstances, the promulgation of rules does its greatest disservice to the public, to those who seek to comply with the law, and to those who in good faith may disagree.

REASON FOR GRANTING THE WRIT

The decision of the Court below will radically alter the regulation of the American economy.

The decision below radically alters the manner in which the federal government has enforced the trade regulation laws.

In the past, Section 5 has been enforced on a case-by-case basis through careful development of record facts and comprehensive judicial review of the fact-finder's application of the law to those facts. If the decision below is upheld, the Commission will in the future be able legislatively to make new law simply by giving notice of the action it proposes to take, receiving comments from the public, and taking final action on the basis of those comments and any other matters it deems relevant, whether or not they are part of the record. The Commission need not have any factual evidence to support its action; it need only give a brief statement of the reasons for its rules, which a reviewing court (including this Court) is then constrained to accept unless they are clearly arbitrary and capricious.*

* *Compare* Sections 7 and 8 of the Administrative Procedure Act, 5 U.S.C. §§ 556-57, pursuant to which the Commission has in the past proceeded, *with* Section 4 of that Act, 5 U.S.C. § 553, which the decision below now permits the Commission to utilize. See 5 U.S.C. §§ 701-706 for the different standards of proof and judicial review applicable to these two sets of proceedings.

The decision below has the following results.

1. The decision converts the Commission into a substitute-Congress. It confers an expansive power to proscribe by virtually *ex parte* determinations every and any detail of the manufacture, sale, pricing, distribution, retailing, financing, advertising, promotion, and point-of-sale presentation of every product and service, whenever the Commission concludes that they are "unfair".* This constitutes "delegation running riot." *A. L. A. Schecter Poultry Corp.* v. *United States,* 295 U.S. 495, 553 (1935) (Cardozo, J., concurring). It renders superfluous other specific Congressional enactments throughout the field of economic regulation. It provides the basis for endless expansion and diffusion by Commission trade regulation rules of federal and state legislation. For example, the "Four Installment Rule" under the Truth-in-Lending Act, recently considered by this Court in *Mourning* v. *Family Publications Serv., Inc.,* 41 U.S.L.W. 4517 (U.S. Apr. 24, 1973), could equally be comprehended in a Commission trade regulation rule.

2. The decision substitutes Commission administrative fiat for more than half a century's judicial development of the antitrust and related laws. It emasculates the traditional role of the courts. Antitrust law has been developed and applied against the backdrop of full record facts which

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* The unlimited reach of the rule-making authority upheld by the court below is starkly revealed by its recognition that the Commission's rulemaking authority cuts deeply into and "widely across virtually all of American business" (Petitioners' Appendix, p. 52), and that it is:

> "tantamount to a power to scrutinize and to control, subject of course to judicial review, the variety of contracting devices and other means of business policy that may contradict the letter or spirit of the antitrust laws" (*Id.*).

This Court's decision in *FTC* v. *Sperry & Hutchinson Co.,* 405 U.S. 233 (1972), of course, extends the reach of Section 5 far beyond just the letter or spirit of the antitrust laws.

courts are peculiarly suited to ascertain and develop. This Court has itself insisted upon the need to establish antitrust principles upon a full understanding of the factual stuff of which business practices are made. See *White Motor Co.* v. *United States,* 327 U. S. 253, 263 (1963). Yet if the decision below is left unexamined, the courts, including this Court, will no longer have any meaningful role whenever the Federal Trade Commission chooses to act by rulemaking. Such rules can never be tested against an evidentiary record or probative facts, and will be subject to reversal by the courts only if they are clearly arbitrary and capricious.

3. The decision destroys the development of the entire statutory framework of enforcement of the Federal Trade Commission Act.

Underlying the historical, unquestioned technique of permitting the Federal Trade Commission to expand what can be included within the meaning of "unfair methods of competition" or "unfair or deceptive acts or practices" in all nationwide commerce was the recognition that those who desired to regulate, and administratively to write new law, would have to do so on *facts* adduced by sworn testimony subjected to the acid test of cross-examination. No suggestion as to the need for efficiency or expedition in the administrative process can negate that fundamental of due process in the expansion of Section 5.

But the concept of the court below that "unfair methods of competition" and "unfair or deceptive acts or practices" in commerce may be fleshed out administratively by binding rules is the antithesis of this Court's interpretation of Section 5. In the historical sweep from the dissent of Mr. Justice Brandeis in *FTC* v. *Gratz,* 253 U. S. 421, 429 (1920), to this Court's opinion in *FTC* v. *Sperry & Hutchin-*

son Co., 405 U. S. 233 (1972),* it has been recognized that the Commission would first issue a complaint charging that certain alleged activities constitute a violation of Section 5 and should be proscribed; an adjudicatory hearing would then be held for proof as to the facts alleged; a record would be made; findings of fact entered; and the Commission's factual determinations and legal conclusions would then be subject to judicial review.

Given the sweep of the statute over every area of industrial and business activity, it was never intended by Congress or suggested by this Court that the Federal Trade Commission could by *a priori* determination itself write new binding substantive rules. It was never suggested that without an adjudicatory hearing, a record, and findings of fact based on sworn testimony tested on the anvil of cross-examination, the Commission could substitute merely an opportunity for unsworn comment in the form of oral or written statements; that the Commission could in part base its new law-making on its own data never revealed for examination or even comment; or that the Commission's ultimate determinations could be shielded from judicial reversal unless found to be clearly arbitrary and capricious, rather than lacking in substantial support on the basis of an official record as a whole. *Cf. Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951).

To the contrary, as this Court has stated in *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167 (1962) (relied upon more recently in *Sperry & Hutchinson Co., supra*),

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* *See also FTC* v. *R. F. Keppel & Bro., Inc.*, 291 U. S. 304 (1934); *FTC* v. *Beech-Nut Packing Co.*, 257 U. S. 441 (1922); *Cream of Wheat Co.* v. *FTC*, 14 F.2d 40 (8th Cir. 1926); *Toledo Pipe-Threading Mach. Co.* v. *FTC*, 11 F.2d 337 (6th Cir. 1926); *Oppenheim, Oberndorf & Co., Inc.* v. *FTC*, 5 F.2d 574 (4th Cir. 1925).

> "Expert discretion is the lifeblood of the administrative process, but unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion."

For this reason, the "agency must make findings that support its decision, and those findings must be supported by substantial evidence." 371 U.S. at 168. It is impossible to believe that when this Court confirmed the Commission's expansive substantive authority in *Sperry & Hutchinson, supra,* it was intended that Commission action pursuant to such authority could be based on surmise, accumulated "expertise" and other information not sworn, tested by cross-examination, or even placed in an official record. But that would be the effect of the decision below if it is not reversed.

It is the Court of Appeals' amalgamation of public utility, transportation, communication, collective bargaining, and other types of comprehensive regulatory authority with the unlimited substantive power it finds was granted to the Federal Trade Commission (Petitioners' Appendix p. 52) that must be examined by this Court. No license, no certification, no compliance with rate making is required to engage in every aspect of American business. Substantive rulemaking in the field of public utilities, communications, transportation, security dealings, collective bargaining, and the like, rests not only on comprehensive controls, but also on developed agency expertise in the specific area of control. It can hardly be asserted that a single agency, the Federal Trade Commission, possesses ubiquitous expertise in every other facet of the American economy.

It is respectfully submitted that the decision below was erroneous on a question of importance to the future legality of virtually every act or practice in the entire economy. Review by this Court is essential.

Respectfully submitted,

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December 3, 1973

CERTIFICATE OF SERVICE

I, IRA M. MILLSTEIN, hereby certify that on this 3rd day of December, 1973, copies of the Brief Amicus Curiae for the National Retail Merchants Association On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia were personally delivered to the office of the Solicitor General, Department of Justice, Washington, D. C. 20530 and to the office of William Simon, Esq., c/o Howrey, Simon, Baker & Murchison, 1730 Pennsylvania Avenue, N.W., Washington, D. C. 20006, counsel for petitioners; and that a copy of the above-referenced brief was mailed, postage prepaid, to the Secretary of the Federal Trade Commission, Washington, D. C. 20580. I further certify that all parties required to be served have been served.

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COURT, U. S.

No. 73-806

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL PETROLEUM REFINERS ASSOCIATION, *et al.*,
Petitioners,

v.

FEDERAL TRADE COMMISSION, *et al.*,
Respondents.

OPPOSITION OF RESPONDENT-INTERVENORS, ENVIRONMENTAL DEFENSE FUND, CONSUMERS UNION, AND CONSUMER FEDERATION OF AMERICA, TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

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OCTOBER TERM, 1973

No. 73-806

NATIONAL PETROLEUM REFINERS ASSOCIATION, *et al.*,
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OPPOSITION OF RESPONDENT-INTERVENORS, ENVIRONMENTAL DEFENSE FUND, CONSUMERS UNION, AND CONSUMER FEDERATION OF AMERICA, TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondent-Intervenors (three public interest organizations devoted to protection of environmental and consumer concerns) oppose issuance of a writ of certiorari to review the judgment and opinion entered in this case by the United States Court of Appeals for the District of Columbia Circuit.

JURISDICTION

The Court's jurisdiction is invoked by Petitioners under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Does the Federal Trade Commission have statutory authority to issue substantive Trade Regulation Rules which will thereafter be relied upon in subsequent adjudicative enforcement proceedings?

STATUTE INVOLVED

Sections 5 and 6 of the Federal Trade Commission Act, 15 U.S.C. 45-46, as set forth in Petitioners' Appendix at A-7-13.

STATEMENT OF THE CASE

On July 30, 1969, the FTC published in the Federal Register (34 Fed. Reg. 12449) a proposed Trade Regulation Rule declaring that the failure to post "research" octane ratings on gasoline pumps at service stations would constitute an "unfair method of competition" and a "deceptive practice" under Section 5 of the Federal Trade Commission Act (15 U.S.C. 45). Extensive hearings were held, numerous interested persons (including Petitioners' representatives as well as two of the Respondent-intervenors) submitted their views orally and in writing, and all requirements of the rulemaking provisions of the Administrative Procedure Act were observed (5 U.S.C. 553).

On December 30, 1970, the Commission issued an Octane Posting Rule, which had been substantially amended in response to submissions made during the rulemaking, and allowed the industry a six-month grace period before the Rule became effective (36 Fed. Reg. 354).

During that grace period, the Texaco Company wrote the Commission advising it of certain problems about the reliability of the "research" octane rating method required by the Rule. Thereupon, the Commission postponed the effective date of the Rule, re-opened the record for further public comments on the method to be used in computing octane ratings (36 Fed. Reg. 7309) and engaged its own technical consultant from the School of Engineering at the University of California to examine the record.

On August 19, 1971, the Commission published a second proposed Octane Posting Rule based on a different method for computing octane ratings,[1] and again invited public comments (36 Fed. Reg. 16120). On December 16, 1971, the Commission published the final Octane Posting Rule, accompanied by a lengthy modified Statement of Basis and Purpose (36 Fed. Reg. 23871).[2]

DISTRICT COURT PROCEEDINGS. On March 29, 1971, after issuance of the Commission's first Octane Posting Rule, Petitioners filed their Complaint for Declaratory Judgment and Injunctive Relief, challenging the validity of the Rule and the statutory authority of the Commission to issue it (CA App. 1-28).[3] On cross-motions for summary judgment the District Court (Robinson, J.) held that the FTC lacked statutory authority to issue substantive rules such as the Trade Regulation Rules, granted Petitioners' motion for

[1] The Commission proposed the so-called "average laboratory" method which averages the results of the "research" and "motor" methods, and its expressed as (R+M)/2.

[2] The Commission adopted the "average laboratory" method included in its proposed Rule of August 19, 1971.

[3] "CA App." refers to the printed Appendix in the Court of Appeals, a copy of which has been lodged with the clerk.

summary judgment, and enjoined the Commission from implementing the Rule (340 F.Supp. 1343; A-16-29).

Rejecting the Commission's argument that Section 6(g) of the FTC Act, empowering it "to make rules and regulations for the purpose of carrying out the provisions of this Act", was a grant of substantive rulemaking power, the District Court concluded that Section 6(g) was "intended only as an authorization for internal rules of organization, practice, and procedure" (A-19).

In reaching this conclusion, the District Court placed heavy reliance on the "clear" legislative history of the FTC Act (A-19). Since Section 6(g) originated in the House version of the FTC Act, which conferred only investigative powers on the Commission, and since the Senate version made no provision for the promulgation of rules and regulations even though it did establish a strong Commission with the authority to prescribe unfair, deceptive, and anti-competitive business practices, the District Court found that "the rulemaking grant in Section 6(g) could only have been intended as an adjunct to the Commission's investigative powers" (A-19).

The District Court found further support for this conclusion since 1) the FTC had failed for many years to assert the rulemaking authority it now claims; and 2) in recent legislation expanding the FTC's authority, Congress had "clearly and unequivocally" spelled out its grant of substantive rulemaking authority (A-22).

CIRCUIT COURT PROCEEDINGS. On June 27, 1973, the Court of Appeals for the District of Columbia (Wright, J.) reversed the ruling of the District Court and held that the FTC was empowered under its governing statute to

promulgate substantive rules of business conduct which, once issued, would be used by the Commission in adjudicatory proceedings aimed at obtaining cease and desist orders against violations of the Section 5 statutory standard (A-31).

In an exhaustive opinion, supplemented by a detailed analysis of the relevant Congressional debates, the Court initially examined "the words of the statute creating the Commission and delineating its powers" (A-33). Noting that Section 5 of the FTC Act first directs the Commission to prevent unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, and then specifies that this goal is to be accomplished by means of a complaint, hearing, findings, and cease and desist order, the Court of Appeals refused to find anything in Section 5(b) "suggesting that adjudication alone is the only proper means of elaborating the statutory standard" under Section 5(a) (A-34). On the contrary, the Court of Appeals pointed out that decisions from this Court (citing *United States v. Morton Salt Co.*, 338 U.S. 632 (1950) and *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966)) have established "that the powers specified in Section 6 do not stand isolated from the Commission's enforcement and law-applying role laid out in Section 5" (A-38). Because "Section 5 enforcement through adjudication will be expedited, simplified, and thus 'carried out' by use of this substantive rule", the Court rejected Petitioners' arguments to limit the use of Section 6(g) to mere procedural, as opposed to substantive, rules for administration of the Section 5 adjudication and enforcement powers (A-40).

Moreover, the Court of Appeals found its conclusion "reinforced by the construction courts have given similar provisions in the authorizing statutes of other administrative

agencies" (A-40), citing Supreme Court cases upholding the rulemaking authority of the Federal Communications Commission (*United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956)), the Food and Drug Administration (*Weinberger v. Hynson, Westcott & Dunning, Inc.*, U.S. (1973), 37 L.Ed, 2d 207), the Federal Power Commission (*FPC v. Texaco, Inc.*, 377 U.S. 33 (1964)), the Interstate Commerce Commission (*American Trucking Assns. v. United States*, 344 U.S. 298 (1953)), the Federal Reserve Board (*Mourning v. Family Publications Service, Inc.*, U.S. (1973), 41 U.S. Law Week 4517), and the National Labor Relations Board (*NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969)).

As to the legislative history of the FTC Act, upon which Petitioners relied so heavily, the Court's examination revealed that it was "ambiguous" at best, but that in no event did it "compel the conclusion that the Commission was not meant to exercise the power to make substantive rules with binding effect in Section 5(a) adjudications" (A-54).

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals, upholding the FTC's statutory authority to use substantive rulemaking as a means of carrying out its Section 5 responsibilities, is eminently correct. Relying primarily upon the plain meaning of Section 6(g) of the FTC Act, authorizing issuance of "rules and regulations for the purpose of carrying out the provisions" of the Act, the court below carefully and painstakingly disposed of all of Petitioner's arguments. In particular, the Court focused upon the legislative history of the FTC Act and, upon careful analysis of debates and

Committee reports, properly concluded that Congress was never straightforwardly confronted with the question of whether the FTC was to proceed via rulemaking as well as case-by-case adjudication. Faced with ambiguous, indecisive, and admittedly murky legislative history, it would have been the height of judicial interventionism for the Court of Appeals to rule in Petitioners' favor – to override the plain meaning of the statute; to ignore this Court's own admonitions that Section 5 and Section 6 of the FTC Act are to be read as an "integrated whole", and to reject the general trend of administrative law decisions from this Court recognizing that rulemaking is flexible, practical, and fairer to those among the regulated than other available administrative techniques. In short, finding no merit in Petitioners' arguments the Court of Appeals correctly refused "in the absence of compelling evidence that such was Congress' intention . . . [to] prohibit administrative action imperative for the achievement of an agency's ultimate purposes", *Permian Basin Area Rate Cases*, 390 U.S. 747, 787 (1968).

Petitioners attempt to avoid the force of these compelling considerations by beclouding the issue before this Court with appealing complaints about "radical" new FTC procedures which lack due process safeguards. But such arguments simply do not withstand analysis.

First, there is nothing particularly "new" about substantive Trade Regulation Rules since the FTC first commenced such proceedings in 1962.[4] Thus, the Commission has been exercising substantive rulemaking power, with the full knowledge of industry, for over a decade, without any district

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[4] See the Commission's amendment of its Rules of Practice, 27 Fed. Reg. 4636, 4796.

court or court of appeals questioning its authority prior to the present litigation.

Second, the only issue before the Court – as agreed to by all parties – is the *statutory* authority of the FTC to issue the Trade Regulation Rules. Questions about the *procedural* adequacy of those proceedings were explicitly reserved (A-32, 33, footnote 2), and were neither briefed below nor passed upon by the Court of Appeals.

Finally, Petitioners continually and conveniently ignore two procedural options open to them: first, they can always challenge the substance of a Trade Regulation Rule (*i.e.*, whether the Rule itself is arbitrary and capricious) in the kind of suit for injunctive and declaratory relief which they brought below; second, upon being charged with violating a Trade Regulation Rule, they must be afforded all the adjudicatory safeguards (*i.e.*, issuance of complaint, hearing, findings, issuance of cease and desist order) set forth in Section 5(b) and can thereafter obtain judicial review in the appropriate Court of Appeals, as provided in Section 5(c) of the FTC Act. In light of these opportunities to challenge administrative action, Petitioners' claims of lack of due process ring hollow.

Finally, Petitioners complain of "controversy and confusion" in Congress and the business community about the FTC's exercise of rulemaking authority. We suggest that such controversy and confusion is mostly of Petitioners' own making.

After over a decade of FTC rulemaking, the question of the Commission's statutory authority has reached only one Court of Appeals. And it has responded with a clear and resounding affirmance of the Commission's power. There

are no contrary judicial precedents from any other Circuit or from any other district court other than that reversed in this case. We fail to perceive what "controversy and confusion" can exist on this issue.

As to alleged "uncertainty" in the Congress, that hardly constitutes a valid reason for granting a petition for certiorari. As a co-equal branch of the American government, the Congress is well-equipped to make its own legislative and political judgments without this Court doing its work for it.

ARGUMENT

I. THE DECISION BELOW, CONSISTENT WITH PRIOR DECISIONS OF THIS COURT, CORRECTLY FINDS THAT THE FEDERAL TRADE COMMISSION HAS STATUTORY AUTHORITY TO ISSUE SUBSTANTIVE TRADE REGULATION RULES AS A MEANS OF MORE EFFECTIVELY AND MORE FAIRLY CARRYING OUT ITS SECTION 5 RESPONSIBILITIES

Section 6(g) of the FTC Act empowers the Commission to "make rules and regulations for the purpose of carrying out the provisions" of the Act. Recognizing that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency", (*SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)), the FTC decided in 1962, to issue Section 6(g) Trade Regulation Rules which would provide clear, substantive standards of conduct defining for members of an affected industry what practices fell within the broad proscriptions of Section 5(a) of the Act. In the present case the Commission determined, after extensive hearings under the Administrative Procedure Act,

that it would be both unfair and deceptive for service stations to fail to post octane ratings to inform consumers what octane gas they were purchasing.

The decision of the Court of Appeals upholding the statutory authority of the FTC to issue such substantive rules is firmly gounded in this Court's recent ruling in *Mourning v. Family Publications Service, Inc.*, U.S. (1973), 41 U.S. Law Week 4517, 4521:

> Where the empowering provision of a statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of this Act', we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation'.[5]

As the Court of Appeals said below, "the substantive rule here unquestionably implements the statutory plan" (A-40). The Commission has long been criticized for a failure to establish priorities so that it could concentrate its resources on those economic problems with the greatest public impact, for its tendency to undertake protracted litigation concerning relatively trivial issues, for inordinate and unnecessary delay in the processing of cases at both the administrative and judicial level, and for publication of obscure advisory opinions without adequately informing

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[5] See also *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *FPC v. Texaco, Inc.*, 377 U.S. 33 (1964); *American Trucking Assns. v. United States*, 344 U.S. 298 (1953).

members of the business community of what they can or cannot do within the framework of Section 5.[6]

The use of rulemaking to flesh out the standards of conduct to be applied in subsequent Section 5 adjudications directly addresses these problems. Moreover, as this Court recently emphasized, after acknowledging the great efficiency of rulemaking for an agency faced with a particularly heavy caseload, "a case-by-case approach is inherently unfair because it requires compliance by one manufacturer while his competitors marketing similar drugs remain free to violate the Act", *Weinberger v. Bentex Pharmaceuticals,* U.S. (1973), 37 L.Ed. 2d 235, 242.

Thus, it is particularly ironic that Petitioners choose to attract this Court's review by consistently raising the specter of wholesale denial of the rights of due process. For in addition to the fact that both the District Court and the Courts of Appeals (A-17-18, A-32-33, footnote 2) both decided this case solely on the threshold question of the FTC's statutory authority and thereby excluded consideration

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[6] Henderson. *The Federal Trade Commission: A Study in Administrative Law and Procedure* (1924); Cushman, *The Problems of the Independent Regulatory Commission,* p. 24 (1937); Commission on Organization of the Executive Branch of the Government, *Task Force Report on Regulatory Commissions* (Hoover Commission Report) (1949); Bureau of the Budget, Federal Trade Commission Study 4 (Staff Report No. (F-60-124) (1960); Senate Committee on the Judiciary, 86th Cong., 2d Session, Report on Regulatory Agencies to the President-Elect (1960) (Landis Report); Auerbach, *The Federal Trade Commission: Internal Organization and Procedure,* 48 Minn. L. Rev. 383, 390, 445-449, 464-465 (1964); Cox, Fellmuth & Schultz, *The Consumer and the Federal Trade Commission,* pp. 51-71 (1969) (Nader Report); *Report of the ABA Commission to Study the Federal Trade Commission,* p. 310, 311, 328-32 (1969) (ABA Commission); Baum, *Reorganization, Delay and the Federal Trade Commission,* 15 Admin. L. Rev. 92, 93, 108-110 (1963).

of all procedural arguments, the conclusion is inescapable that substantial due process advantages inhere to Petitioners and other members of the business community from rule-making rather than individual case-by-case adjudication. After analyzing these advantages at length, the Court of Appeals summarized as follows (A-49-50):

> To us, these cases [*Chenery, supra, Wyman-Gordon, supra,* and *Bell Aerospace Division of Textron, Inc. v. NLRB*, 475 F.2d 485 (CA 2, 1973)] suggest that contemporary considerations of practicality and fairness – specifically the advisability of utilizing the Administrative Procedure Act's rule-making procedures to provide an agency about to embark on legal innovation with all relevant arguments and information, 5 U.S.C. 553 – certainly support the Commission's position here . . . [U]tilizing rule-making procedures opens up the process of agency policy innovation to a broad range of criticism, advice and data that is ordinarily less likely to be forthcoming in adjudication . . .
>
> Such benefits are especially obvious in cases involving initiation of rules of the sort the FTC has promulgated here . . . a vast amount of data had to be compiled and analyzed, . . . True, the decision to impose a bright-line standard of behavior might have been evolved by the Commission in a single or a succession of adjudicatory proceedings. . . But evolution of bright-line rules is often a slow process and may involve

> the distinct disadvantage of acting without the broad range of data and argument from all those potentially affected that may be flushed out through use of legislative-type procedures.

As part of their deprivation of due process argument, Petitioners suggest that rulemaking is a "radical" new procedure designed to deny them their rights under Section 5(b) of the FTC Act. Were the use of Trade Regulation Rules quite as "radical" as Petitioners argue, surely they would have been challenged in more than one proceeding in the decade they have been used by the FTC, and more than one district court judge who has now been reversed, would have found Petitioners' arguments persuasive. [7]

More importantly, Petitioners do, in fact, retain all their existing Section 5(b) rights. In order for the Commission to proceed against them, a complaint must be issued, a full hearing must be held, findings of fact must be made, and a cease and desist order must be issued. Such final order is, of course, reviewable in the appropriate Court of Appeals, 15 U.S.C. 45(c).

Thus, the FTC procedure in reality operates to give Petitioners two bites at the administrative apple: first, they are given full opportunity under the Administrative Procedure

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[7] Petitioners have, it is true, done all they could to stop any government agency from imposing a requirement for the posting of octane ratings. Thus, for example, they have filed suit against a Cost of Living Council decision requiring such posting, raising substantially the same arguments raised herein, but tailored to the specifics of that case (*National Petroleum Refiners Assoc. v. Dunlop*, D.C.D.C., C.A. No. 1669-73). Petitioners' request for preliminary injunctive relief was denied by the Temporary Emergency Court of Appeals on Sept. 4, 1973.

Act to participate in the rulemaking, and then to challenge it in court as they have done in the present proceeding; and second, they are given an additional opportunity in a Section 5 adjudicatory proceeding to establish that they have not violated the Trade Regulation Rule (in whose formulation they have had the opportunity to participate) or that it is inapplicable to them, and to seek judicial review of any adverse findings entered against them.

In the face of clear and plain statutory language in Section 6(g), in the face of a long line of decisions from this Court upholding the exercise of substantive rulemaking authority when necessary to implement the enabling statute, and in the face of what even Petitioners concede to be the advantages of rulemaking (Petition for Writ of Certiorari, p. 20), Petitioners can invoke only some scattered bits and pieces of ambiguous legislative history – analyzed in painstaking detail by the Court of Appeals in the Appendix to its opinion – to try to prove that Congress did not intend the FTC to issue substantive rules.

But the negative inferences on which Petitioners' case is built, and the "casual statements from floor debates, not always distinguished for candor or accuracy" (*Schwegman Bros. v. Calvert Distillers*, 341 U.S. 384, 396 (1950)), do not constitute the "compelling evidence" of Congressional intention which this Court has required in order "to prohibit administrative action imperative for the achievement of an agency's ultimate purposes", *Permian Basis Area Rate Cases*, 390 U.S. 747, 787 (1968).

Finally, it should be made clear that despite the passage of extensive legislation affecting the FTC in the decade it has been exercising authority to issue substantive rules, never once has Congress taken definitive action – *i.e.*,

actually passed legislation – to modify or eliminate that authority.[8] Moreover, Petitioners' assertion that Congress has on three occasions passed statutes "superseding" Commission Trade Regulation Rules is patently misleading (Petition for Writ of Certiorari, page 21, footnote 10). Congressional action concerned only the substance of these individual Rules (upholding the Rule on unsolicited mailing of credit cards,[9] reversing the cigarette labelling Rule,[10] and adopting the substance of the Rule on

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[8] Petitioners take great comfort from the fact that on six separate occasions Congress has specifically granted the FTC substantive rulemaking authority. But, as the Court of Appeals concluded, in examining the history of these laws (A-74-75):

> it is equally possible that Congress granted the power out of uncertainty, understandable caution, and a desire to avoid litigation.
>
> • • •
>
> Where there is solid reason, as there plainly is here, to believe that Congress, in fact, has not wholeheartedly accepted the agency's viewpoint [questioning whether it had statutory rulemaking authority] and instead enacted legislation out of caution and to eliminate the kind of disputes that invariably attend statutory ambiguity, we believe that relying on the *de facto* ratification argument is unwise.

[9] The credit card rule was issued at 35 Fed. Reg. 4614, and later incorporated into the Truth-in-Lending Act, 15 U.S.C. 1642, *et seq.*

[10] The cigarette labelling Rule appears at 29 Fed. Reg. 530, 8324, 12626, 15570, 30 Fed. Reg. 9484, and was changed in the Federal Cigarette Labelling and Advertising Act, 15 U.S.C. 1331, *et seq.*

shipping unordered merchandise),[11] not the use of rule-making authority. What is crucial to note is that Congress refused in each instance to take any action jeopardizing the Commission's statutory power to issue such Rules.[12]

In sum, the relevant legislative history amassed before, during, and since passage of the FTC Act cannot be construed to overcome the plain language of Section 6(g), especially viewed in the context of the Commission's statutory framework and responsibilities, and the long line of judicial precedent from this Court, most recently reinforced by *Mourning, supra,* and *Weinberger v. Hynson, Westcott & Dunning, supra.*

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[11] The proposed Rule on shipment of unordered merchandise appears at 35 Fed. Reg. 10116, 14328, and was then incorporated into the Postal Reorganization Act, 31 U.S.C. 3009.

[12] In the case of the Cigarette Rule, the Conference Report was very explicit: "The conference substitute provides that except for prohibitions applicable to cigarette advertising, nothing in this legislation shall be construed to limit, restrict, expand, or otherwise affect the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes, nor to affirm or deny the Commission's holding that it had the authority to issue the trade regulation rules or to require an affirmative statement in any cigarette advertising", 2 U.S. Code & Cong. News, 89th Cong., 1st Session, 2368 (1965).

II. THE MISSION OF THE FTC, WHETHER CARRIED OUT THROUGH ADJUDICATION OR SUBSTANTIVE RULEMAKING, IS NO DIFFERENT FROM THAT OF OTHER REGULATORY AGENCIES WHOSE ACTIVITIES MAY ALSO AFFECT LARGE SEGMENTS OF THE AMERICAN ECONOMY

Petitioners and their amici, American Bankers Association, the National Retail Merchants Association, and the National Consumer Finance Association, seek to paint a picture of the Federal Trade Commission as an all-powerful Big Brother of the marketplace, regulating "virtually every act or practice in the entire economy,"[13] seemingly without restraint. Consequently they argue on the one hand that review is warranted because the decision below gives the FTC power to proscribe "every and any detail of the manufacture, sale, pricing, distribution, retailing, financing, advertising, promotion, and point-of-sale presentation of every product and service, whenever the Commission concludes that they are 'unfair' ".[14] On the other hand, they argue that the FTC's exercise of rulemaking is not to be judged by the same legal principles as those applied in analagous cases (such as *Storer, supra; Texaco, supra; Wyman-Gordon, supra;* and *Mourning, supra*), because "Congress has confined the granting of substantive rulemaking power to agencies possessing pervasive regulatory authority over specific agencies,"[15] and review is therefore warranted because of the erroneous application of those principles to the FTC.

[13] See Brief Amicus Curiae for the National Retail Merchants Association, p. 9.

[14] Brief Amicus Curiae for the National Retail Merchants Association, p. 5, footnote omitted.

[15] Petition for A Writ of Certiorari, p. 13.

Apart from the inconsistency of the two arguments we submit that neither one is persuasive. In terms of the relevant principles of administrative law enunciated by this Court in the cases just cited, there is no difference between the vast powers exercised by the FCC regulating every radio and television station in the country, by the NLRB with the power to oversee the labor relations practices of almost every interstate employer in the country, by the Federal Reserve Board whose activity impacts every bank in the country – and the FTC. We submit that in our complex inter-related economy, where there no longer exists any isolated, self-sufficient industry, the dichotomy suggested by Petitioners is totally unsupportable. "This Court has repeatedly held that the width of administrative authority must be measured in part by the purposes for which it was conferred" (*Permian Basin Area Rate Cases, supra,* 390 U.S. at 776), not as Petitioners argue, by whether an agency has license-granting authority.

Nor does the extensive regulatory role entrusted to the Commission play any part, as Petitioners claim, in the alleged "controversy and confusion" created in the business community and the Congress by the decision below.

What is the confusion in the business community – other than the obvious apprehension pervading the amici briefs that the FTC may at some point focus on the commercial practices of their own members? There is no conflict among the circuits or among district courts. In the twelve years since the FTC has asserted rulemaking authority, no cases other than the present one have reached decision nor are there any awaiting decision. The law is perfectly clear to any member of the business community prepared to follow it: the FTC has been issuing binding Trade Regulation Rules for over a decade, and its authority to do so

has been vigorously upheld by the one appellate court which has ruled on it.

As to the alleged Congressional confusion and uncertainty about the FTC's rulemaking powers, this surely must be Petitioners' weakest argument of all for asking this Court to grant a writ of certiorari. Congress has full legislative authority to affirm or deny the rulemaking authority of any Federal agency, whenever it so desires.[16] It is not necessary for this Court, with its own heavy mandatory workload, to accept discretionary jurisdiction over a case so as to do the legal research for a co-equal and co-ordinate branch of the government.

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[16] Moreover, whatever the decision of this Court if it issues the writ of certiorari, Congress is free to enact legislation either specifically granting rulemaking power if the Court rules the FTC statute does not now grant it, or denying or limiting such power if this Court rules that the FTC Act does authorize substantive rulemaking.

CONCLUSION

Respondent-intervenors submit that there is no necessity for granting the writ of certiorari. The decision below applies well-accepted principles of administrative law in a manner totally consistent with the most recent cases of this Court. There is no conflict among the Circuits; indeed this case has not even been presented to any other court for final decision, nor is it presently pending in any other Circuit. Thus, it is obvious that there is no "controversy and confusion" over the decision of the Court below. The only "controversy" which exists is Petitioners' disagreement with the decision below. And that, we submit, is insufficient reason for granting a writ of certiorari.

Respectfully submitted,

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January 9, 1974

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of January, 1974, the foregoing "Opposition of Respondent-Intervenors, Environmental Defense Fund, Consumers Union, and Consumers Federation of America, to Petition for a Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit" was served as follows:

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SUPREME COURT, U.S.
JAN 17 197
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No. 73-806

In the Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL PETROLEUM REFINERS ASSOCIATION, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-806

NATIONAL PETROLEUM REFINERS ASSOCIATION, ET AL.,
PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 30–101)[1] is reported at 482 F.2d 672. The opinion of the district court (Pet. App. 16–29) is reported at 340 F. Supp. 1343.

JURISDICTION

The judgment of the court of appeals (Pet. App. 30) was entered on June 27, 1973, and rehearing

[1] "Pet App." refers to the appendix to the petition for a writ of certiorari; "App" refers to the appendix in the court of appeals.

was denied on August 6, 1973 (Pet. App. 104). On October 26, 1973, the Chief Justice extended the time in which to file a petition for a writ of certiorari to November 20, 1973. The petition was filed on that date. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the rulemaking power in Section 6(g) of the Federal Trade Commission Act authorizes the Federal Trade Commission to issue rules defining unfair and deceptive trade practices made unlawful by Section 5 of the Act.

STATUTE AND REGULATION INVOLVED

Sections 5 and 6 of the Federal Trade Commission Act, 38 Stat. 719, 721, as amended (15 U.S.C. 45 and 46) and the Federal Trade Commission Octane Posting Trade Regulation Rule (16 C.F.R., Part 422, 36 Fed. Reg. 23871) are set forth in pertinent part at Pet. App. 1–15.

STATEMENT

Petitioners (two trade associations and thirty-four oil refining companies) seek review of a unanimous decision of the court of appeals (Pet. App. 30–101) that the Organic Act of the Federal Trade Commission authorizes it to promulgate rules defining unfair trade practices for the purpose of Section 5. As the court of appeals noted, after promulgation "the rules would be used by the agency in adjudicatory proceedings aimed at producing cease and desist orders

against violations of the statutory standard" of sections (Pet. App. 31).

1. *Proceedings Below.*—On July 30, 1969, the Commission proposed a trade regulation rule declaring that the failure to post octane numbers on gasoline pumps at service stations would be an "unfair method of competition" and a deceptive practice within the meaning of Section 5 of the Federal Trade Commission Act (the "Act"), 15 U.S.C. 45. 34 Fed. Reg. 12449. The Commission invited interested persons to submit their views orally or in writing and conducted hearings pursuant to its Procedures and Rules of Practice (16 C.F.R. 1.16) and Section 4 of the Administrative Procedure Act, 5 U.S.C. 553. All submissions were entered in the public record and responsive comments were also received.

After reviewing all comments, the Commission issued an altered proposed Octane Posting Rule on December 30, 1970. 36 Fed. Reg. 354. To provide affected companies time to prepare for compliance, the rule was made effective six months later. Prior to the effective date, the Commission was advised in writing by Texaco Inc. that the method which the Commission proposed to determine octane ratings might not be fully reliable. Thereafter, the Commission reopened the record to reconsider that portion of the Rule relating to rating of octane. 36 Fed. Reg. 7309. After receiving additional comments, the Commission proposed a modified Octane Posting Rule requiring that an average laboratory octane number be posted

on gasoline pumps; further comments were invited. 36 Fed. Reg. 16120.

On December 16, 1971, the Commission adopted the revised Octane Posting Rule in issue here, to become effective March 15, 1972 (36 Fed. Reg. 23871), together with a fifty-eight page Statement of Basis and Purpose. 36 Fed. Reg. 23871. [2]

While the Commission was still considering the rule, petitioners filed a complaint for declaratory judgment and injunctive relief, challenging the rule and the authority of the Commission to issue it. [3]

The matter was submitted to the district court on cross-motions for summary judgment (App. 61–62, 87–88). The district court held that the Commission does not have authority to issue substantive trade regulation rules. The court concluded that the legislative history of the Act, as well as the context of the Act's grant of rulemaking power to the Commission in Section 6(g) (15 U.S.C. 46(g)), demonstrated that only procedural, not substantive, rulemaking authority was conferred (Pet. App. 19). Having so concluded, the district court did not reach the petitioners' challenges to the reasonableness of the rule and to the procedures employed by the Commission in promulgating it.

[2] The effective date of the Octane Posting Rule was suspended by the district court and no new effective date has been set by the Commission.

[3] The suit was filed in the United States District Court for the Southern District of Texas (App. 1–28). That court granted the Commission's motion to transfer the case to the United States District Court for the District of Columbia (App. 29).

The court of appeals unanimously reversed, and remanded the matter to the district court for resolution of the remaining issues. In an extensive opinion (Pet. App. 30–77) supported by an appendix reviewing in detail the Act's legislative history (Pet. App. 78–101), the court of appeals held that the plain language of Section 6(g) conferred substantive rulemaking power on the Commission. It relied upon the construction which this Court had previously given other subsections of Section 6, and similar grants of rulemaking authority in other statutes. In light of the Commission's broad statutory mandate to prevent unfair and deceptive practices which may harm competition or consumers, the court of appeals rejected claims that the Commission's authority was solely prosecutorial in nature and that case-by-case adjudication was the exclusive means available to the Commission for defining conduct it deemed to violate Section 5.

While recognizing that the Act's legislative history did not clearly disclose Congress' specific intent respecting rulemaking, the court concluded that Congress' broad purpose in adopting the Act would be furthered by reading Section 6(g) to incorporate the benefits and advantages of the substantive rulemaking power. The court ruled that such a power does not "bypass the Commission's statute-based cease-and-desist proceedings. It merely supplements them" (Pet. App. 65–66). Finally, the court held that the agency's failure previously to exercise substantive rulemaking authority was not proof that it did not possess it.

ARGUMENT

The court of appeals correctly held that the Federal Trade Commission has authority to promulgate substantive rules defining particular activities that constitute unfair methods of competition and unfair or deceptive acts or practices. That holding is supported by both the language of the statute and its legislative history and accords with decisions of this Court recognizing the authority of other regulatory agencies to adopt substantive rules under comparable statutory provisions.[4] There is no occasion for further review.

1. As the court of appeals recognized, substantive rulemaking "is convincingly linked to the goals of agency expedition, efficiency, and certainty of regulatory standards that loomed in the background of

[4] The provisions of Section 6 of the Federal Trade Commission Act (15 U.S.C. 46), *inter alia*, are made applicable to the jurisdiction, powers and duties of the Secretary of Agriculture in enforcing the Packers and Stockyards Act of 1920 and similar legislation. 7 U.S.C. 222; 21 U.S.C. 467d, 677, 1051. But cf. 7 U.S.C. 228(a); 21 U.S.C. 463, 1043. Pursuant to his rulemaking authority the Secretary has from time to time issued rules which are regarded as advisory in nature, and in reviewing adjudicative actions taken by the Secretary, where a person was found to have violated the statute and a regulation, two courts of appeals have observed in dicta that the imposition of sanctions depends upon a violation of the statute as opposed to the regulation. See *United States* v. *Donahue Bros.*, 59 F. 2d 1019, 1022 (C.A. 8); *Fairbank* v. *Hardin*, 429 F. 2d 264, 269 (C.A. 9), certiorari denied, 400 U.S. 943. In neither case, however, did the court hold that the Secretary was not authorized to adopt substantive rules defining what he would regard as an act or practice in violation of the laws he was administering, and there is no conflict alleged between those decisions and the instant case.

the 1914 passage of the Federal Trade Commission Act" (Pet. App. 64).[5]

Section 5(a)(6) of the Federal Trade Commission Act (15 U.S.C. 45(a)(6)) directs the Commission to prevent "unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." In framing the statutory standard broadly, Congress has charged the Commission with the responsibility of giving content and meaning to an otherwise "elusive"[6] standard. Congress declined to confine the Commission to a purely prosecutorial role by listing in the statute specific unfair practices. Instead, it cloaked the Commission with broad powers of investigation and enforcement so that it could effectively define the broad statutory standard and apply it to the myriad aspects of commercial transactions.[7]

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[5] See S. Rep. No. 597, 63d Cong., 2d Sess., pp. 5, 6, 8, 10, 12, 13, 22; H. Rep. No. 1142, 63d Cong., 2d Sess., p. 19.

[6] *Federal Trade Commission* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244.

[7] The Senate Committee on Interstate Commerce explained this decision:

"The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others." (S. Rep. No. 597, *supra*, at p. 13.) The conference report confirms this view:

"It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this

The 1938 Wheeler-Lea Amendment to Section 5 (52 Stat. 111) legislatively confirmed this Court's prior conclusion that the Act was not "intended to confine the forbidden methods to fixed and unyielding categories." *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 310. The Act was intended to reach across the entire spectrum of commerce, protecting both competition and consumers from unfair and deceptive practice. *Federal Trade Commission* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244. For this broad statutory standard to be administered effectively, the powers assigned to the Commission throughout the Act must be read as an "integrated whole." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 650.

Section 6(g) of the Act (15 U.S.C. 46(g)) authorizes the Commission, without limitation, "to make rules and regulations for the purpose of carrying out the provisions of this Act." Utilizing the rulemaking authority of Section 6(g) to define and particularize the statutory standard not only simplifies and expedites enforcement of the Act, but also provides the Commission with a broad range of views to consider in formulating a standard. Cf. *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 201–203; *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, 764–765.

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field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task." (H. Conf. Rep. No. 1142, *supra*, at p. 19.)

As enacted, Section 5 of the Act (15 U.S.C. 45) declared unlawful "unfair methods of competition in commerce * * *." (The prohibition of Section 5 has since been broadened to include "unfair or deceptive acts or practices." 52 Stat. 111.) Section 5 also empowered the Commission, by instituting adjudicatory proceedings resulting in issuance of an order to cease and desist from using such methods of competition, to prevent persons from engaging in such activities. As the court of appeals recognized (Pet. App. 34), Section 5 does not contain limiting language suggesting that case-by-case adjudication is the *only* method available to the Commission to elaborate and define the statutory standard of unfairness.

Trade regulation rules do not circumvent the adjudicative method of enforcement provided for in Section 5. Adjudicative proceedings are still required before a person may be subjected to sanctions for violation of the Act or a rule. Rather, the rules supplement the adjudicative method by providing a prior determination by the Commission of the essentially legal question whether a particular act covered by the rule constitutes an unfair method of competition or a practice proscribed by Section 5. Such a determination having been made by the Commission, on the basis of its informed judgment and expertise, the scope of inquiry is narrowed when the Commission conducts the specific enforcement proceedings under Section 5, without which the rule can have no ultimate legal effect.

Accordingly, because a rule defining an unfair practice or an unfair method of competition establishes only a legal standard and is not designed to determine whether any particular person in fact engaged in conduct that violated the rule and hence Section 5, it does not infringe any rights of a respondent in adjudicatory proceedings under Section 5. The respondent can still demonstrate that its conduct did not fall within the rule, or that changed conditions or other special circumstances warrant waiver of the rule as to it. See also p. 11, *infra*, n. 8.

In addition to their role in adjudicatory proceedings, moreover, trade regulation rules provide guidance to the business community with respect to specific unfair trade practices.

2. Contrary to petitioners' contention (Pet. 12), comparable exercises of rulemaking authority have often been upheld by this Court in decisions which recognize that an administrative agency like the Commission is not confined to the adjudicatory process in elaborating the contours of the statute it administers.[8] *Federal Power Commission* v. *Texaco,*

[8] Petitioners' contention is partially based on the erroneous view that the absence in the statute of specific procedures governing formulation of rules and judicial review of such rules indicates that adjudication is the only method available to define unfair practices or methods of competition. Other statutes which petitioners acknowledge to have provided the Commission and other agencies with substantive rule-making power (Pet. 12–13) likewise do not specify procedures for promulgation of such rules nor do they provide for judicial review of rule-making (as opposed to review of orders in adjudication). *E.g.*, Wool Products Labeling Act of 1939 (15 U.S.C. 68d(a)); Federal Power Act (16 U.S.C. 825h); Securities Act of 1933

Inc., 377 U.S. 33, 39; *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192;* *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609. The standard for evaluating the exercise of an agency's rulemaking authority was restated only last term in *Mourning* v. *Family Publications Serv., Inc.*, 411 U.S. 356, 369:

> Where the empowering provision of a statute states simply that the agency may "make * * * such rules and regulations as may be necessary to carry out the provisions of the Act" we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is "reasonably related to the purposes of the enabling legislation." *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 280–

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and other laws administered by the Securities and Exchange Commission (15 U.S.C. 77s(a), 77sss(a), 78w(a), 79t(a), 80a–37, 80b–11); Communications Act of 1934 (47 U.S.C. 303(r)); National Labor Relations Act of 1935 (29 U.S.C. 156); Civil Aeronautics Act of 1938 (49 U.S.C. 1324(a)). All of these enactments, like Section 6(g), antedated the Administrative Procedure Act of 1946 (5 U.S.C. 553, 701) which now provides generally applicable procedures for promulgation and judicial review of agency rules. Accordingly, in promulgating substantive rules pursuant to Section 6(g), the Commission now must comply with the procedures specified in that Act, and the rules adopted are subject to judicial review thereunder (*e.g.*, as to whether they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. 706 (2)(A)). Such judicial review can occur in a direct challenge to the validity of the rule prior to its enforcement (*Abbott Labs.* v. *Gardner*, 387 U.S. 136, 139–141), or in the context of court of appeals review of an order to cease and desist issued by the Commission on the basis of a person's violation of the rule and hence Section 5. See 15 U.S.C. 45(c); cf. 5 U.S.C. 703.

*Rulemaking was upheld in *Storer*, *supra*, as necessary to the "orderly conduct of * * * [Federal Communications Com-

281 (1969). See also *American Trucking Association* v. *United States*, 344 U.S. 298 (1953) [footnotes omitted].

3. That the Commission's rulemaking authority is an integral part of, and may be used to implement, the agency's enforcement powers under Section 5 is demonstrated by the broad language of Section 6(g) and this Court's construction of Section 6 in *United States* v. *Morton Salt Co., supra.* There, in holding that the Commission could use the additional powers granted to it by Section 6 to aid in the implementation of the enforcement powers conferred by Section 5 (338 U.S. at 647–651), this Court specifically rejected the contention—also made by petitioners here—that the Commission's authority under Section 5 was "self-contained and sealed off" from its authority under Section 6. *Id.* at 649. Whether or not the interaction between Section 6(g) and the broad standards of Section 5 was ever specifically considered by Congress, there is nothing to suggest that the draftsmen sought to withhold from the Commission the power to give meaning to and to particularize, through rulemaking, the concept of unfair methods of competition.

During the legislative debates the issue of substantive rulemaking was subsumed within the broader question as to whether the Commission should have

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mission] business." 351 U.S. at 202. Moreover, to deny administrative agencies the opportunity to fill in the interstices of their acts through rulemaking (*Securities & Exchange Commission* v. *Chenery Corp.*, *supra*, 332 U.S. at 202) would undermine the "flexibility sought in vesting broad rulemaking authority in an administrative agency." *Mourning* v. *Family Publications Serv., Inc.*, *supra*, 411 U.S. at 372.

any independent enforcement authority at all. The bill passed by the House provided for a Commission with the investigatorial authority eventually provided in Section 6 but did not prohibit or declare unlawful any conduct, and hence did not grant the Commission power to enforce the Act through adjudicatory proceedings directed against particular violators. The House bill did, however, authorize the Commission "to make rules and regulations * * * for the purpose of carrying out the provisions of this Act." [10] The Senate amendment to the House bill did not contain that rulemaking provision but did include a standard of legality—it condemned unfair methods of competition—to be enforced by the Commission through adjudicatory proceedings.[11]

Under the House bill, because the Commission's role was solely investigatory and it had no authority to proceed against any particular conduct, it may be said to have had no authority to adopt substantive rules. When Congress combined the investigatory function with the authority in the Senate bill to prohibit through adjudicatory proceedings the unfair methods of competition that the Act condemned, the reason for any limitation on the Commission's rule-making authority in the House bill no longer existed. There is no indication that when Congress decided to make unfair methods of competition illegal and to empower the Commission to proceed against substantive offenses, it intended to deny the agency the authority to make

[10] H.R. 15613, 63d Cong., 2d Sess.; 51 Cong. Rec. 9909–9910.
[11] 51 Cong. Rec. 13319.

that power more effective through using the rule-making authority to implement its adjudicatory power.[12] On the contrary, as the court of appeals concluded, "by reinserting a rule-making provision into the stronger commission bill all the conference did was reinstate the *principle* of the House bill as to rule-making—that is, permitting the commission to exercise authority roughly commensurate with its other powers, great or small" (Pet. App. 90; emphasis added).[13]

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[12] Petitioners' reliance upon internal congressional rules concerning the usual authority of a conference committee is misplaced, for such rules provide only a basis for a point of order, are waivable, and have no direct bearing on the validity or scope of legislation enacted pursuant to the actions of a conference committee. In any event, the contention rests upon an unduly narrow reading of the applicable rules, which require the conferees not to include in their reports matters not committed to them by either House, but do permit germane modifications of subjects in disagreement. See, *e.g.*, Senate Manual, p. 171. The inclusion of Section 6(g) with the scope described by the ruling of the court of appeals would be consistent with these requirements. The court's interpretation of the conference committee's version of the bill merely recognizes that the Act is an integrated whole defining a series of complementary powers.

[13] Petitioners misconstrue the comments offered during final debate in the House (Pet. 17) to suggest that Congress did not intend the Commission to exercise substantive rulemaking authority. The court of appeals closely scrutinized these and other post-conference debates (Pet. App. 95–101) and concluded that they do not demonstrate a clear intention to preclude substantive rulemaking. The remarks by Congressman Covington, a floor manager in the House, are not to the contrary. They concern the scope of review of Commission cease and desist orders as compared with "legislative" rules and orders issued by the Interstate Commerce Commission. As the court below recognized, "the power to frame substantive rules,

The fact that the rule-making authority is contained in Section 6 of the Act does not indicate that that authority was intended to be limited to procedural rules. Section 6 is captioned "Additional Powers of Commission," and does not specifically deal with or define the substantive offenses, as does Section 5. What Section 6 does is to give the Commission powers additional to those conferred in Section 5, such as the power to conduct various investigations, to compel and issue reports and, in Section 6(g), "to make rules and regulations for the purpose of carrying out the provisions of this act." One of the Commission's duties in "carrying out" the Act is to conduct adjudicatory proceedings under Section 5 to prohibit unfair methods of competition and unfair or deceptive acts or practices. If the Commission concludes, as it has here, that a rule particularizing certain conduct as violating Section 5 will aid it in "carrying out" the enforcement of that Section, such a rule is authorized by the broad language of Section 6(g).

4. The court below properly rejected petitioner's contentions (Pet. 12–13) that rulemaking is available

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in the context of the FTC, is hardly tantamount to the ICC's power to issue *orders* specifying the prices railroads must thereafter charge" (Pet. App. 96). Commission rules do not operate immediately on a designated class of parties and carry no legal effect unless the agency institutes enforcement proceedings.

Unlike the situation presented by rules adopted pursuant to a truly "legislative" rulemaking power as is exercised by the Interstate Commerce Commission and other agencies (see, p. 20, *infra*, n. 21), a person could not be penalized under the Federal Trade Commission Act, as enacted, until after (1) the person had violated Section 5, (2) the Commisison had issued a cease-and-desist order, (3) the person had then violated the order, (4) a court of appeals had then ordered the Commission's order to be enforced, and (5) the person had again violated the order, at which time contempt sanctions could be sought. 38 Stat. 720; cf. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 477–478. In other words, issuance of a rule by the Commission would have eased the Commission's burden only as to one stage of the enforcement process. Under subsequent amendments, however, penalties may now be imposed for a violation of a final Commission order under Section 5. 15 U.S.C. 45(*l*).

only to administrative agencies that regulate specific industries and that the Commission acts only in a prosecutorial capacity not a regulatory capacity. As indicated previously (pp. 13–14, *supra*), Congress specifically rejected the idea of creating a Commission whose sole function would be prosecutorial. Furthermore, the National Labor Relations Board, which exercises a similar prosecutorial role (29 U.S.C. 160), has been encouraged by this Court to use its general grant of rulemaking authority (29 U.S.C. 156) to issue substantive rules. See *National Labor Relations Board v. Wyman-Gordon Co., supra,* 394 U.S. at 764–765. Although the Commission, like the Board, does not exercise licensing and rate-making authority, the absence of such authority is certainly not a "sufficiently [compelling] distinction" to deny its use of rulemaking (Pet. App. 52).

The court below recognized that the Commission's responsibility to prevent unfair and deceptive practices is as potentially pervasive, in the sense of affecting commercial practices, as the regulatory authority granted other agencies.[14] Furthermore, the potential extent of the Commission's regulatory impact on business practices subject to the Act does not depend upon whether it elaborates the statutory standard by means of adjudication rather than rulemaking. (App. 53)

5. The Commission's failure to exercise substantive rulemaking authority until 1962 does not imply that

[14] The authority of the Securities and Exchange Commission similarly cuts across industry lines.

it does not have that authority. Powers granted by Congress do not atrophy by disuse. *United States* v. *Morton Salt Co., supra,* 338 U.S. at 647–648; *Federal Trade Commission* v. *Dean Foods Co.,* 384 U.S. 597, 610; *United States* v. *E.I. du Pont de Nemours & Co.,* 353 U.S. 586, 590. But cf. *Federal Trade Commission* v. *Bunte Bros., Inc.,* 312 U.S. 349, 351–352. Nor can prior inconsistencies in the Commission's own view of its rulemaking authority displace the independent responsibility of the judiciary to construe the language employed by Congress in a manner consistent with the policy and language of the statute. Cf. *Zuber* v. *Allen,* 396 U.S. 168, 193.[15]

There is nothing to suggest that Congress has implicitly ratified the Commission's prior view of the

[15] Although courts often accord "great weight" to an agency's construction of legislation it administers (*Udall* v. *Tallman,* 380 U.S. 1, 16), the argument for judicial deference is less compelling where, as here, the agency was not involved in the drafting of the legislation (see *Zuber* v. *Allen, supra,* 396 U.S. at 192); the agency's construction has resulted in inaction as opposed to affirmative action, the former having possible alternative justifications and the latter requiring an unequivocal assertion of agency position (cf. *United States* v. *Morton Salt Co., supra,* 338 U.S. at 647–648; *Federal Trade Commission* v. *Bunte Bros., Inc., supra,* 312 U.S. at 358–359 (Douglas, J., dissenting); and the question does not require the agency's particular expertise. As the court below recognized, "[h]ere, the question is simply one of statutory interpretation concerning the procedures and setting in which the Commission may elaborate the statutory standard. Since this sort of question calls largely for the exercise of historical analysis and logical and analogical reasoning, it is the everyday staple of judges as well as agencies" (Pet. App. 70–71). Furthermore, the court's decision conforms to the Commission's own view of its rulemaking authority.

limited scope of its rulemaking authority. Cf. *Power Reactor Dev. Co.* v. *International Union of Elec. Workers,* 367 U.S. 396, 409. Indeed, when Congress expanded the Commission's regulatory authority to include such areas as products labeling,[16] and flammable fabrics,[17] it specifically included rulemaking among the Commission's responsibilities. Far from representing a *de facto* ratification of the view that the Commission's authority under Section 6(g) is limited, these enactments indicate a purpose to remove any possible basis for dispute over the existence of the power.[18] The legislative history of the Fair Packaging and Labeling Act of 1967, cited by the court below (Pet. App. 74–75), supports the view that such grants of rulemaking authority were largely motivated by Congress' desire to eliminate doubts.[19] Moreover, in each such enactment the resulting rules were given independent legal significance in that the laws required compliance with both the statute and the regulations.

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[16] Wool Products Labeling Act of 1939, 15 U.S.C. 68a, 68d(a); Fur Products Labeling Act, 15 U.S.C. 69a (a), (b), (c), 69f(b); Textile Fiber Products Identification Act, 15 U.S.C. 70a (a), (b), (c), 70e(c); Fair Packaging and Labeling Act, 15 U.S.C. 1454(a), 1455(b), 1456(b).

[17] Flammable Fabrics Act, 15 U.S.C. 1194(c).

[18] "Public policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations." *Wong Yang Sung* v. *McGrath,* 339 U.S. 33. In *Federal Trade Commission* v. *Dean Foods Co., supra,* 384 U.S. at 610, this Court refused to infer that, by seeking ratification from Congress, the agency admitted acting upon a wrong construction of the Act.

[19] See H. Rep. No. 2076, 89th Cong., 2d Sess., p. 22; S. Rep. No. 1186, 89th Cong., 2d Sess., pp. 17, 40.

6. This Court is also urged to review the decision below to eliminate Congressional "uncertainty" in this area (Pet. 23). The question in this case, however, is "not what the [Commission] thinks it should do but what Congress has said it can do." *Civil Aeronautics Board* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 322. As petitioners recognize (Pet. 22), all of the bills introduced in the past two years giving the Commission specific authority to promulgate substantive rules reflect a recognition by their sponsors that the Commission should have all the tools necessary to prevent unfair and deceptive practices, including substantive rulemaking authority. Congressional uncertainty focuses on the scope of such rulemaking authority and the procedures to be employed. Should Congress be dissatisfied with the scope of the Commission's powers under the Act as construed by the court of appeals, it can amend the Act to alter the Commission's authority. Indeed, it recently passed up an opportunity to do so.[20].

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[20] Subsequent to the decision below, Congress specifically amended Sections 5 and 6 of the Federal Trade Commission Act in several respects, but made no changes affecting in any way the scope of Section 6(g) as construed by the court of appeals. (Trans-Alaska Pipeline Authorization Act, 87 Stat. 591–592). This failure to act is particularly significant because the provisions of the Pipeline Act relating to the Commission paralleled similar provisions in a bill previously passed by the Senate (S. 356, 93d Cong., 1st Sess.; 119 Cong. Rec. S. 16439, (daily ed., Sep. 12, 1973); see 119 Cong. Rec. S. 12967–12968 (daily ed., July 10, 1973) which, when introduced, had contained provisions giving the Commission explicit powers to adopt substantive rules. In discussing the deletion of those provisions from the bill as reported to the Senate, the Commerce Committee stated that the deletion had been made in anticipa-

Petitioners also claim that Congress has "superseded" three of the Commission's twenty trade regulation rules (Pet. 21). This contention has no bearing on the question presented here. Trade regulation rules merely narrow the scope of inquiry in Commission enforcement proceedings and provide guidance to the business community. Even if there were no question concerning the Commission's authority to issue such rules, Congress might still choose to add to the significance of the rules by providing civil or criminal penalties for failure to comply with the rules themselves, as opposed to the statute.[21] It might also incorporate the substance of a rule in a statute, thereby insuring that the position reflected in the rule would not be administratively altered and possibly providing remedies which the Commission could not readily have provided.[22]

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tion of a favorable ruling by the court of appeals in the instant case (S. Rep. No. 93–151, 93d Cong., 1st Sess., p. 32), and later, in the debates, Senator Magnuson, chairman of the committee, expressed satisfaction that the court of appeals had "now held that the Commission already possesses ample, unfettered rulemaking powers." 119 Cong. Rec. S. 16429 (daily ed., Sep. 12, 1973).

[21] See, *e.g.*, 15 U.S.C. 77x, 77yyy, 78ff, 79z–3, 80a–48, 80b–17; 16 U.S.C. 825o(b); 47 U.S.C. 502; 49 U.S.C. 1471–1472.

[22] This is precisely the effect of Congressional action cited by petitioners. For example, under the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282, as amended (84 Stat. 87, 15 U.S.C. 1331, *et seq.*) Congress provided that a violation would constitute a misdemeanor subjecting the offender to a fine of not more than $10,000. 15 U.S.C. 1336(c)) provides that "[n]othing in this act shall be construed to affirm or deny the Federal Trade Commission's holding that it has the authority to issue trade regulation rules or to require an affirmative statement in any

15 U.S.C. 1338 However, Section 7(c) of that Act.

7. In the present posture of this litigation, review at this time would be premature because several issues remain to be resolved on remand to the district court. Petitioners have challenged not only the Commission's statutory authority to promulgate the Octane Posting Rule, but also the procedures employed in adopting it and the factual basis for it.[23] If they should ultimately prevail on either of those contentions, there would be no need to decide whether the Commission has that authority.

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cigarette advertisement." In the Trust in Lending Act (15 U.S.C. 1643), Congress added to the substance of the Commission's rule a provision limiting liability for unauthorized use of a credit card, and in the Postal Reorganization Act (39 U.S.C. 3009), Congress added to the Commission's proposed rule a prohibition against the mailing of bills for unordered merchandise.

[23] The district court must also resolve petitioners' contentions that the Rule represents an unconstitutional usurpation of Congress' legislative power, and that the Rule is arbitrary, capricious and an abuse of discretion. No adverse consequences result from deferral of review by this Court of the validity of the Rule in view of the fact that no effective date for the Rule has been set. See p. 4, *supra*, n. 2. Moreover, on August 17, 1973, the Cost of Living Council issued a regulation respecting octane posting (38 Fed. Reg. 22536, 22538; 6 C.F.R. 150.351, 150.352), which became effective August 19, 1973.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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